IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 124

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL No. 122, PHIL L. VALLEY, JOHN ALEXANDER, and JACK HEISDORF, each individually, as Business Agent, Organizer, and Vice President, respectively, for, and as representatives of all the members of Hotel & Restaurant Employees' International Alliance, Local No. 122;
INTERNATIONAL LAUNDRY WORKERS, LOCAL No. 174;
BARTENDERS INTERNATIONAL LEAGUE OF AMERICA, LOCAL No. 61, sometimes known as International Bartenders & Beverage Dispensers, Local No. 61;
INTERNATIONAL UNION OPERATING ENGINEERS, LOCAL No. 311;
MILWAUKEE BUILDING TRADES COUNCIL;
All affiliated with the American Federation of Labor,
Petitioners and Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, HENRY C. FUELDNER, individually and as chairman of, L. E. GOODING, individually and as a member of, R. FLOYD GREEN, individually and as a member of the Wisconsin Employment Relations Board;
PLANKINTON HOUSE COMPANY, a Corporation,
Respondents and Appellees.

Brief of Respondent Wisconsin Employment Relations Board

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POINT I.—SEC. 111.06 (2) (e) OF THE ACT, AS CONSTRUED BY THE STATE SUPREME COURT AND READ IN THE LIGHT OF ALL RELEVANT PROVISIONS IS NOT VIOLATIVE OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AS DEPRIVING THE PETITIONERS OR ANY MINORITY OF THE EXERCISE OF THE RIGHT OF FREEDOM OF SPEECH. 38-116

A. The petitioners' entire argument against the validity of sec. 111.06 (2) (e) is grounded upon a construction of that section repudiated by the State Supreme Court,—a construction which that court says the statute will not bear. 38

B. It is apparent from petitioners' argument that their real quarrel with the decisions under review is a quarrel with the Supreme Court's construction of th statute—such criticism raises no federal question. 43

1. The Supreme Court of the State merely took the traditional approach of the judiciary toward any question of statutory construction where constitutional rights are involved, namely that of adopting a construction which would not present any grave question of constitutionality,—of saving and not destroying even though the interpretation arrived at might not be the most obvious interpretation. 45

C. The Wisconsin Supreme Court in substance construed sec. 111.06 (2) (e) and the terms used therein to comprehend only violent, intimidating or coercive picketing, boycotting and other overt concomitants of a strike by persons acting in concert; decided that said section, when read in the light of sec. 111.15, could not be construed to deny a

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minority the right to peacefully picket or exercise the right of freedom of speech and that sec. 111.15 forbade any such construction—analysis of the decisions. 46

1. This construction of the statute by the Supreme Court of the State is as much a part of the statute as if the words were expressly written therein—that construction is binding upon this Court. 51

D. The challenged section as construed does not deprive petitioners or minorities of freedom of speech guaranteed by the 14th amendment as it regulates only conduct which falls outside of that area. 53

1. The petitioners not only misconstrue the challenged section but the argument made against the constitutionality thereof, however construed, is such an all-out argument for freedom of speech as an absolute right as to leave the legislatures of the several states completely powerless to cope with the problem of concert of action directed at injury of another so long as speech is a factor in accomplishing the injury—the principles for which petitioners contend are so utterly vicious as to destroy any society which harbors them. 54

2. The cases cited to support the argument obviously are of no such far reaching import—analysis of the cases. 55

E. Because of the construction placed upon the challenged section by the Supreme Court of Wisconsin there is no occasion for this Court to appraise the substantiality of the need for it but even if there is such occasion, it is manifest that there was and is a substantial need because of (1) the power given to labor under prior state legislation,

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(2) the abuse of this power by labor, (3) the bitter struggle then and now being waged within the ranks of organized labor,—the AFL—CIO conflict, (4) problems which arose out of new acts beneficial to organized labor such as the National Labor Relations Act and the State counterpart thereof, and (5) facts known to all with respect to the functioning of organized labor including peaceful picketing used as an instrument to perfect and maintain a boycott. 71

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3. New acts promotive of labor's interests, such as the National Labor Relations Act, and factional wars within the ranks of labor gave rise to additional real problems. 80

4. Facts known to all with respect to the functioning of organized labor. 89

F. Because of the construction placed upon the challenged section by the Supreme Court of Wisconsin, there is no occasion for this Court to consider the Act as a whole for the purpose of examining the extent to which the Act manifests regard for the balancing of rights of all major interests but even if there is such occasion, it is apparent from an analysis of the Act that it does show a scrupulous legislative regard for the balancing of rights of all major interests. 93

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2. The Wisconsin Court's use of the terms "coercion" is not inexact or inaccurate. 111

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A. Petitioners' argument contra is grounded upon repudiation of the principle upon which the whole structure of collective bargaining is rested. 116

B. The classification is entirely similar to that of the National Labor Relations Act. 120

POINT III

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A. The picketing at or near the hotels was set in a background of violence, force, fear, intimidation and coercion—the case is ruled by the Meadowmoor case. 122

B. The order was narrowly adjusted to the factual situation presented to the board and dealt with by the courts of the State—the petitioners were not prohibited from picketing any place except at or near the hotels. 124

1. The order is more narrowly drawn and adjusted to the factual situation dealt with than was the order in the Meadowmoor case. It does not prohibit advertising the facts of a labor dispute by any means whatsoever or at any place whatsoever except by use of picketing at or near the hoteds. 126

C. In sustaining the order of the board the courts of the State anticipated and anticipated correctly this court's holding in the Meadowmoor case. 134

1. The Trial Court's temporary stay order pending appeal to the Supreme Court of the State in no sense determined that it was unnecessary to prohibit picketing as prescribed by the order to eliminate from the case the coercive effect of past conduct or that similar conduct was not likely to be engaged in by petitioners at any propitious opportunity. 139

2. Both the Trial Court and the Supreme Court grounded the validity of the order in question upon the violent, intimidating and coercive conduct which characterized the campaign as continuously threatening and coercive far more than did the Supreme Court of Illinois in the Meadowmoor case. 2

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D. Even if the case at bar is not ruled by the Meadowmoor case, the order of the board nevertheless is not violative of petitioners' right to freedom of speech under the 14th amendment as the picketing engaged in was for the purpose of compelling the company to commit an unfair labor practice by entering into an all-union agreement with petitioners contrary to the provisions of sec. 111.06 (1), (c) and (e), Stats.—the picketing was for an unlawful object. 144

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Brief of Respondent Wisconsin Employment Relations Board

On October 13, 1941 this Court granted certiorari to review decrees of the Supreme Court of the state of Wisconsin which affirmed the judgment of the Circuit Court of Milwaukee county, dated May 14, 1940, sustaining, con-

firming and enforcing an order made by the Wisconsin Employment Relations Board on February 15, 1940 (R. I 47-52)*.

OPINIONS OF THE COURT BELOW

The original opinion of the State Supreme Court (R. II 48-64) is reported in 236 Wis. 329; 294 N. W. 632. The opinion denying motion for rehearing (R. II 69-71) is reported in 236 Wis. 329, 352; 295 N. W. 634.

JURISDICTION

The jurisdiction of this court rests on sec. 237B of the Federal Judicial code (28 U. S. C. A., sec. 344 (b)).

STATEMENT OF THE CASE

A. Nature of the case and the procedural facts

The Plankinton House Company (hereinafter referred to as the company) is a corporation which operated the Plankinton House and Kilbourn Hotel both located in the city of Milwaukee (R. I 251). On or about the 20th day of November, 1939, the company filed complaint with the Wisconsin Employment Relations Board (hereinafter referred to as the board) charging the unions, the officers and agents thereof (petitioners herein) and the members

*R. I refers to Vol. I of the Record. R. II refers to Vol. II of the Record.

thereof with unfair labor practices, to-wit, violation of sec. 111.06 (2) (a) (e) (f) (g) (h) and (j) and sec. 111.04 of the employment peace act*.. (R. I 8, 64-70).

The unions, their officers and agents answered in substance denying such unfair labor practices and raising a number of constitutional issues with respect to the validity of ch. 57, Laws of 1939 (the Employment Peace Act) (R. I 8-9, 70-81).

After due notice of hearing an extensive hearing was held before the full board (R. I 9, 81-251).

On February 15, 1940 the board made its findings of facts, conclusions of law and order. (R. I 251-263). The order required the involved unions (petitioners herein) the officers, members, agents, successors and assigns of each, to

"1. Immediately cease and desist from:

(a) Engaging in promoting or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company;

(c) Boycotting in any way the Plankinton House Company.

*The Act is printed as Appendix "B" to the petition for writ of certiorari and the brief filed in support thereof, pp. 59-78. The complaint filed by the company is detailed and sets forth with particularity acts and instances alleged to constitute violations of the various subsections of sec. 111.06 (2) as set forth above (R. I 58-70). The complaint was not confined to violation of sec. 111.06 (2) (e) as might be inferred from petitioners' statement of the case (petitioners' brief, p. 6).

"2. Take the following affirmative action, which the board finds will effectuate the policies of the act:

(a) Post notices to their members in conspicuous places at the union headquarters that the union has ceased and desisted in the manner aforesaid, and that all officers, members and agents of the union are to refrain from engaging in promoting or inducing picketing and boycotting of the Plankinton House Company, and also to refrain from attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company.

(b) Notify the board in writing forthwith that steps have been taken by each of the respondent unions to comply herewith." (R. I 261)

The petitioners herein then petitioned the Circuit Court for Milwaukee County for a review of the order of the board (R. I 2-7) pursuant to the provisions of sec. 111.07 (8) of the Employment Peace Act. The board answered and cross petitioned for enforcement of its order (R. I 6-12). The Circuit Court, on May 14, 1940, entered judgment sustaining, confirming and enforcing the order of the board (R. I 47-52).

The petitioners herein appealed from that judgment to the Supreme Court of the state of Wisconsin and that court, in the opinions hereinbefore referred to, affirmed the judgment of the Circuit Court.

B. The facts

1. The collective bargaining agreement with the unions

The unions involved herein are voluntary, unincorporated associations, each affiliated with the American Federation of Labor (R. I 251). On the 16th day of June, 1938, the Plankinton House Company entered into a collective bargaining contract with said unions, which contract covered wages, hours and working conditions governing the employees of the Plankinton House and the Kilbourn Hotel, the contract providing as a condition of such employment that all employees coming within the terms of said contract must be and remain members of one of the respective unions so long as they were employed by the company (Finding 5 of the board, R. I 252)*.

The contract further provided that it was to continue for a period of one year, ending on the 15th day of June, 1939, and for consecutive one year renewals unless either party served notice in writing on the other party at least thirty days before the expiration of such year that said party desired to terminate the agreement at the end of such contract year. It was further provided that either party might notify the other party in writing within thirty days of the date of termination of such contract that it desired the contract continued for an additional year, and that such party desired to negotiate hours, wages and working conditions for the following contract year. If such notice was sent, the contract was to continue in force and the terms agreed upon by virtue of such subsequent ne go-

*None of the findings of the board were challenged on the appeal to the State Supreme Court. They are, therefore, established verities upon this review.

tiations were to be retroactive from the date of the commencement of any such year. If the parties could not reach an agreement through negotiations on or before thirty days after the termination of the preceding contract year, the difference was to be submitted to arbitration in accordance with the procedure prescribed by the contract. Such arbitration was to be final and binding on both parties, but if either party were dissatisfied with the arbitration award, the right to strike or lock-out was reserved to the union and the company respectively (finding 6 of the board, R. I 253).

2. The negotiations

The Company had notified the unions that it desired its contract to continue for another year and that it desired to negotiate hours, wages and working conditions for such additional contract year (Finding 3 of the board, R. I 254, Ex. 3). The unions had given similar notice to the Company (Finding 7 of the board, R. I 253, Ex. 2, 16). The representatives of the interested parties met on June 27, 1939 to negotiate (Ex. 54). Other hotels besides those conducted by the Plankinton House Company were involved in the negotiations. The representatives of the hotels felt that with the number of interests involved in the transaction and so that there might be no misunderstanding as to any of the discussion that took place, a court reporter should be present. Mr. Goldberg, attorney for the unions, refused to negotiate with a court reporter present. Nothing much seems to have been accomplished at the aforesaid meeting other than to suggest that the parties submit their desired changes in writing. This was done.

The unions presented their proposed contract revisions (Ex. 5). The proposals were not unreasonable and were such as to form a fair basis for negotiation. Thereafter, the Company submitted in writing its suggested contract revisions. These revisions were submitted about July 1, 1939 (Finding 9 of the Board, R. I 254, Ex. 6). By comparison of Ex. 6 and Ex. 1, it will be seen that the changes desired by the Company were substantially as follows:

1. That the article relating to exclusion of employees from membership in the union be enlarged to include others who were in close relationship to the management or had some supervisory duties.

2. That the arbitration provision be changed so as to eliminate the provision that either party should have the right to a strike or a lockout in the event such party was dissatisfied with the arbitration award.

3. That the closed shop provision of the contract be eliminated.

4. That the seniority clause be revised to make it more flexible and workable.

5. That there be a classification of hotels in the city for the purpose of wage scale, such classification, however, not to affect present wages.

All of these requests were reasonable and legitimate subjects of negotiation.

The response to the involved hotels' suggested changes was a letter dated July 11, 1939 (Ex. 7) in which it was stated that the counter-proposals embodied therein were highly unacceptable and unsatisfactory. The letter was in the following tenor:

"* * * We regret to note that the tenor of such revisions evinces an anti-labor attitude on the part of your respective clients, and we can only say that in all probability this is a natural consequence of the recent anti-labor laws passed by the Wisconsin Legislature. * * *"

The letter further states:

"In view of the seeming impossibility to get together Local 122, Hotel & Restaurant Employees International Alliance of America, in accordance with Articles I and III, which provide there shall be no strike or lockout arising out of failure to negotiate a contract unless arbitration be had, the said Local 122 herewith demands arbitration affecting its contract, and herewith designates Phil L. Valley and I. E. Goldberg as its representatives on said arbitration board."

The letter also enclosed a proposed letter and the attorneys representing the involved unions stated that they proposed to send said letter to the National Letter Carriers Association unless a contract were executed by Saturday, July 15, 1939. The letter concludes:

"We hope that after due consideration your clients will think better of their position, and will enter into a contract with the unions, and not make necessary arbitration or the sending of the letter to the convention committee of the Letter Carriers' Association.".

The sample letter to be sent to the convention committee on July 15 (quite regardless of arbitration) accuses the involved hotels (faced with serious problems to arbitrate) as having taken an arbitrary anti-union attitude, blacklists the involved hotels, and requests the convention committee

to inform all its locals throughout the country to advise their delegates to refrain from making reservations at such hotels and also to advise cancellation of reservations already made.

3. The arbitration proceedings

The points of difference between the involved unions and the involved hotels were submitted to arbitration September 20, 1939 (Ex. 19), the intervening time apparently having been consumed in endeavoring to agree upon a fifth arbitrator, inability to agree thereon and finally the appointment of Alfred H. Handrich by the Wisconsin Employment Relations Board (Ex. 8, 19; Finding 10 of the Board, R. I 254).

The involved hotels submitted their differences with the involved unions to the board of arbitration and in a true spirit of arbitration. The unions did not. Ex. 19 (the arbitration proceedings) is an exhibit with respect to which we invite the court's most careful consideration*. It appears very clearly from the exhibit that the five matters heretofore mentioned which the hotels wanted embodied in a new contract were all matters of vital importance to them.

The Plankinton Hotel was the only one of the involved hotels that appeared to be making any money and it was making a very small return upon the capital invested. The Hotel Wisconsin Company had not made any money since 1931 (Ex. 19, page 51). The result of operations during the

*If there is any occasion in this case for this court's appraising the substantiality of the need for the challenged legislation (which there is not) the exhibit, as an object lesson in arrogance, speaks for itself.

preceding year was a net loss of $42,649. The operations for the current year (1939) were resulting in a worse loss than the preceding year. The operations in 1937, which was a very good year for hotels comparatively, resulted in a loss of over $6,000 for the Wisconsin Hotel Company. They had not made a profit for a period of seven or eight years (Ex. 19, page 52). The company owned two 99 year leases and the present rental payable under those leases was $20,000 a year. The owners of the ground had not received a cent of ground rent since 1933 because there wasn't any money available for that purpose. The company was in default to the extent of approximately $100,000 in taxes (Ex. 19, page 52).

Mr. Goldberg stated many times that the uniform hotel contract used in Milwaukee was the finest in the country (Ex. 19, page 54). Granted that to be true, its very excellence presented serious management problems to these hotels. The hotels were far from exhibiting an anti-union or unfair labor attitude in endeavoring to arrive at some solution of their problems.

The request that the article relating to the exclusion of employees from membership in the union be enlarged to include others who were in close relationship to management and who had supervisory duties, was a most reasonable request. The exclusion of the front office help from the contract at the Plankinton (persons very close to management) involved about 10 people (Ex. 19, page 62) out of a total of 188 (R. I 158). At the Medford Hotel, it involved 8 employees out of 121. The matter of clarifying that provision in the contract also involved honest operations by other hotels under the terms of their contracts

with the unions. This point appears very conclusively (Ex. 19, page 55 et seq.)

Ordinarily those in close relationship to management and having supervisory duties are not eligible for membership in a union of operation employees. It is difficult for such employees to serve two masters. When nationally organized unions seek to have company dominated unions disestablished, one of the points invariably pointed out to establish company domination is that of membership in the company union of employees who are close to management.

The unions' attitude upon this request was no different from that upon all of the other requests. Every request that the hotels endeavored to seriously arbitrate, the unions' attitude was one of adamant opposition thereto, a complete refusal to even listen to it and a threat to strike if the request was granted by the board of arbitrators. The arbitration was one of arbitrating with a shotgun and with the shotgun pointed at the fifth arbitrator.

There can be no real arbitration under such circumstances. Ex. 19 is a conclusive argument with respect to the reasonableness of point 2 which the hotels submitted to arbitration, namely, that of an arbitration clause which amounted to something and which would make the arbitration award binding upon the parties. It was calculated to make the arbitration clause amount to something other than waste motion and it was calculated to put the parties in a position where both would have to arbitrate upon the merits rather than by the shotgun process. This case itself demonstrates the reasonableness, not to mention the desirability of granting such request.

Point 3 involved elimination of the closed shop or all-union provision in the contract. The hotels took the posi-

tion that said clause was not in accordance with the spirit of Ch. 57, Laws of 1939 (the Employment Peace Act) and that they disliked compelling employees to join a union if the employees did not want to do so. This matter finally came down to a point where the involved hotels signified their willingness to having a closed shop provision in the contract provided the employees wanted a closed shop provision and voted therefor at an election to be conducted by the Wisconsin Employment Relations Board. The attitude of the involved hotels was a most reasonable one and in accordance with existing law (Ex. 19, page 71 et seq.).

The 4th point submitted to arbitration, namely, a requested revision of the seniority clause so as to make it more flexible and workable, does not appear to have been unreasonable. The reasons therefore are stated at page 70 of Ex. 19. The seniority clause is a most troublesome clause in any union contract with employers. There necessarily has to be some flexibility in it. The seniority rule in state or national service, while a desirable rule, if rigid and unflexible, will often mean that the incompetent and unadaptable are filling jobs that the competent and adaptable should fill. The seniority rule, while undoubtedly desirable in any union contract, does make for round pegs in square holes and without considerable flexibility makes for inefficiency and serious management or administrative problems.

The argument for the classification of hotels (the fifth point submitted by the hotels for arbitration) is presented on page 64 of Ex. 19. No one could say that the request was an unreasonable request. With respect to hotels operating at losses or upon an extremely small margin of profit,

it would seem that the request was a necessary one if the hotels were to survive.

4. The arbitration award

On October 30, 1939, the board of arbitration issued its award, the two members appointed by the involved unions dissenting (Ex. 9). The award in general granted all of the union requests for revision (none of the requests had been opposed by the involved hotels). The only provision granted in the award which had been urged by the hotels was a provision that a closed shop was to be effective only upon the condition that the employees of the respective hotels involved, by a secret ballot conducted under the supervision of the Wisconsin Employment Relations Board, voted in favor of a closed shop by a 75 per cent majority. This provision conformed to the provisions of sec. 111.06 (1) (c) regarding all-union contracts. On November 1, the Company notified the unions' attorney, Mr. Goldberg, of its acceptance of the arbitration award and that it was ready to enter into a contract in accordance with the provisions thereof (Ex. 10, Finding 13 of the Board; R. I 256).

The sole cause of the strike was the refusal of the unions to permit the employees of the company to have anything to say about whether the new contract should contain an all-union agreement clause. The sole object of the strike was to compel the company to enter contractual relations with the unions containing an all-union agree-

ment clause and without such vote and contrary to the arbitration award*.

5. The strike—it was set in a contemporaneous background of violence, force, fear, intimidation and coercion, led by and engaged in by the responsible officers of the unions in charge of the strike

At about four o'clock on November 2, 1939, the business manager of Local 122, Phil L. Valley, "pulled" the strike (R. I 84, 85) and ordered all employees in every department of the Plankinton House and Kilbourn Hotel to cease work. A picket line of 75 or 80 pickets was thrown about all the entrances to the hotels and the pickets continued to parade before the entrances at the time of the hearing before the board (R. I 85).

Prior to the calling of the strike, the employees of the Plankinton House Company did not vote by secret ballot to call such strike. (Finding 15 of the Board, R. I 256, 82). The strike was called at a time when the hotel was full of school teachers who were in Milwaukee for the teachers' convention (R. I 155),—a time calculated to cause just as much harm and injury to the hotels as the unions could cause and to cause as much inconvenience to the public as could be caused.

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*The strike severed contractual relations. The petitioners contended otherwise in the Circuit Court. That Court ruled that the strike did sever contractual relations (R. I 26-31). Upon this point the unions on appeal to the Supreme Court abandoned the position taken in the Circuit Court,—did not assign the Circuit Court's ruling in this regard as error. The question is therefore res judicata. The strike was therefore to compel the company to violate the law, namely that of entering into a contract containing an all-union agreement clause without submitting such question to the employees in a secret referendum ballot conducted by the Board and contrary to the provisions of sec. 111.06 (1) (c) and (e).

The picketing was characterized by booing, hissing, sneering and hooting at guests (R. I 158). The manager of the hotel was spit upon one night (R. I 158). On at least one occasion the pickets carried clubs in their hands in front of the hotel (R. I 158). The campaign was characterized by threats of physical violence directed at the employees, by spitting upon them and by calling them vile names (R. I 101, 104, 136, 139, 140, 141, 142, 145, 146, 148).

Numerous inexcusable assaults and batteries occurred and many of them were committed by responsible officers of the union and those actively in charge of the picketing. The pickets by force attempted to prevent the delivery of products and commodities to the hotel. Violence was implemented by resort to secondary boycott. In numerous instances the union provided bail, provided counsel and paid the fines of those arrested for assaults. All of the matters referred to in this paragraph appear from the findings of the board (not challenged in the State Supreme Court and not open to challenge here) nor are they denied in the record. For convenient reference to the violent and inexcusable conduct and the details connected therewith, we set forth the findings of the board on these matters, as well as citations to the pages of the record where the details may be found (Findings of the Board, R. I 257 et seq.).

> "Phil L. Valley is business manager of Hotel and Restaurant Employees International Alliance, Local No. 122, and as such business manager, notified Marquette University and the Milwaukee School of Engineering, directing that all students working at the Plankinton House for their meals be ordered to immediately discontinue such work, and that unless such

students did discontinue work at the Plankinton House, that the union would be forced to stop the employment of university students working at other hotels and restaurants in the City of Milwaukee which had collective bargaining contracts with Local No. 122" (Finding 17, R. I 114-121).

The result of these demands was that the students of these two educational institutions were forced to quit work for the Plankinton House Company. Rather than jeopardize the jobs of their students working in other hotels and restaurants in the city, the school authorities reluctantly intervened.

"On November 4, 1939, union pickets, by means of force, prevented delivery to the Plankinton House of floral decorations by one Joseph Mueller, an employe of August F. Kellner Company. That as a result of the altercation at said time, Jack Heisdorf, vice-president of Local No. 122, Hotel and Restaurant Employees International Alliance, and Charles McLaughlin, assistant to the secretary of Local No. 122, were arrested, and on November 17, 1939, convicted of assault and battery, McLaughlin being fined ten dollars and costs, and Heisdorf being fined five dollars and costs, the sentence against Heisdorf being suspended and he was placed on probation for thirty days. That Local No. 122 provided counsel and bail for both Heisdorf and McLaughlin and paid McLaughlin's fine" (Finding 19, R. I 102-104, 194).

Heisdorf was not only vice-president, he was also assistant business manager and he was also in charge of the pickets at the hotels (R. I 85) and had control of them (R. I 92).

Charles McLaughlin was not only assistant secretary of Local 122; he was also a captain of pickets (R. I 218). There were about fifteen pickets present at the time Mueller attempted the delivery (R. I 102, R. II 20). The pickets had told Mueller he shouldn't make the delivery because there was a dispute with the boss. Mueller called his employer and was told to go ahead and make the delivery (R. I 103). The policemen formed a line and Mueller was supposed to walk in back of it. Nevertheless McLaughlin and Heisdorf each took a swing at him and destroyed the floral decorations he was carrying (R. II 20)*.

William Komes, head waiter at the Plankinton Hotel, had been asked to unlock the door so that delivery might be made (R. I 100). When he unlocked the door five or six men ran across the street to where he was standing. When he tried to open the door to let one of the men in who was going to do the decorating, the door was shoved in his face (R. I 100-103). Komes fell back against the screen and knocked it over. When he attempted to open the door the pickets called him a "scab" and everything like that (R. I 101). Pickets on other occasions threatened Komes, called him a "scab" and said that he had better look out or they would "get him" (R. I 101).

Peggy Hehmeyer, head waitress and banquet manager of the hotel, on this same occasion was told by a picket that he would "get" her or that she would not get another job (R. I 104).

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*The petitioners (B. p. 47) assert that these arrests and convictions and the others referred to in the findings were civil proceedings for the purpose of collecting a penalty for violation of city ordinances. The record does not substantiate such assertion.

"Charles McLaughlin returned to the picket line immediately after his arrest, and on November 17, 1939, assaulted one Lester Raasch, an employe of the Plankinton House, was again arrested, convicted, and fined twenty-five dollars and costs, and the union again provided him with counsel and paid such fine" (Finding 20, R. I 91, 137, 195).

This was on an occasion when Raasch was attempting to carry salt into the hotel (R. I 137). Delivery was attempted of some five or six bags of salt of about 100 pounds each. Raasch started carrying one of the bags. The women pickets in the line started crowding around him and pulling at the salt and calling for help. Before he got half way to the door Charles McLaughlin and several other men came running at Raasch. McLaughlin started hitting him with his fists. Raasch was struck three or four times in the face (R. I 137). When the policemen grabbed McLaughlin and told him he couldn't do that, McLaughlin's response was that Raasch couldn't get the bag of salt in there either (R. I 137).

"On November 4, 1939, two salesmen representing the Automotive Electrical Association, who were attempting to deliver displays and samples to the Plankinton House, were, by means of force, prohibited from making the delivery by Phil L. Valley and a number of pickets" (Finding 21, R. I 139, 140).

Phil L. Valley was the business manager of Local 122 (R. I 83). Not only was the delivery prevented but it was stated by Heisdorf, vice-president of the Union (R. I 85) that the doors might as well be locked and barred because

nothing was going to get in or out of the building (R. I 140).

There were about ten pickets there at the time this delivery was prevented. Two salesmen who drove up wanted to unload their samples and displays. Valley told them they had no right to bring the stuff in because there was a picket line and nothing was supposed to be brought into the building. An officer present told them they had the right to bring it in. Weber, a steward at the Plankinton House, asked the men to let him have the packages. Valley turned and pushed his hand away, stared at him for a moment, took off his glasses and said, "If you fellows want to get tough, we'll get tougher."* (R. I 139, 140)

> "On November 10, 1939, Jack Heisdorf, Charles Alden, striking employe of the Plankinton House, and other pickets, by the use of force, prevented delivery of ice cubes to the Plankinton House; and in the course of the attempted delivery, Charles Alden assaulted Robert Jeske, then an employe of the Plankinton House" (Finding 22, R. I 104, 112, 113, 125, 126).

This was an occasion when the company was trying to get into the hotel five or six galvanized cans containing ice cubes. The cans were about four feet high and twenty-seven or twenty-eight inches in circumference (R. I 104). The hotel employees were endeavoring to take the cans from the rear compartment of a car and carry them into the hotel (R. I 105). Alden got Jeske around the neck and struck him three or four times in the face with his clenched fist (R. I 104-112, 113, 125, 126, 156). Heisdorf, in conjunc-

*There is no evidence at all that anyone was getting "tough". The steward was simply trying to effect delivery.

tion with other pickets, kept grabbing the cans away from the employees and tipped them over. Heisdorf, vice-president, assistant business manager and in charge of and in control of the pickets (R. I 85, 92), was the ringleader (R. I 105, 112, 113, 125, 126, 156). The company was successful in effecting delivery of one can only. All the others were tipped into the street and left there (R. I 105). The scene was a mob scene. Heisdorf told one of the employees that he thought he was going to stay home and that he had better stay in the hotel (R. I 125).

> "On November 17, 1939, Paul Zeibell, an employee of the Plankinton House, was assaulted by James O'Brien, a picket employed by the union, and stationed on the picket line at the Plankinton House. O'Brien was arrested, convicted and fined five dollars and costs" (Finding 23; R. I 132-136).

Zeibell was a bellboy (R. I 132). On the morning in question Zeibell had been asked by a guest to take two sample cases from the guest's room to a taxi (R. I 102). Zeibell stood in the vestibule with the cases while the guest telephoned to determine the fare to the express office. O'Brien was in the picket line and began making nasty remarks, as he always did, calling Zeibell all kinds of vile names. O'Brien was parading with the pickets directly in front of the hotel. After calling Zeibell these names, as O'Brien approached the entrance in his march, he looked around, handed his sign to the picket in front of him, stepped out of line and without warning struck Zeibell a blow on the right side of his neck with his clenched fist (R. I 132-133, 134, 136, 195). The names called were vile to an extreme degree (R. I 132). O'Brien was an ex-prize

fighter, a former member of Local 122, but not at the time of these occurrences (R. I 88). The union paid him for his picketing (R. I 218).*

> "On November 14, 1939, Edward Knopf, an employe of the Plankinton House, was assaulted by John Thomas O'Maher, a picket stationed by the union at the Plankinton House, and a striking employe of the Plankinton House" (Finding 24; R. I 145).

Local 122 provided bail, counsel, and paid the fine (R. I 89). Knopf intended to take his car and drive another bellboy to see his mother. As he stepped out on the street to get his car, O'Maher kicked him in the back of the knees (R. I 145, 195). A few days later Knopf saw O'Maher again and O'Maher told him to come outside and he would take care of him. He said he wanted to get hold of him and raised his fist (R. I 145).

> "On November 17, 1939, Rudolph Stano, an employe of the Plankinton House, was assaulted by Joseph Hofich, a picket stationed at the Plankinton House by the union, and Hofich was arrested, convicted, and fined five dollars and costs" (Finding 25, R. I 149).

This assault arose out of an occasion when a guest had asked Stano, a bellboy, to take a picture to a car which the guest had parked in front of the hotel in the loading zone (R. I 149). As Stano finished putting the picture in the car, Hofich jumped on Stano's back and started slugging him with his clenched fist. Stano had said nothing to

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*O'Brien was the only one involved in any of these acts of violence who was not a member in good standing of the involved unions. All of the pickets were paid an hourly wage by Local 122 (R. I 88, 218).

Hofich or to any of the pickets (R. I 150). Hofich jumped out of the picket line without any warning, jumped on Stano's back and commenced to assault him (R. I 196). Hofich was a captain of pickets (R. I 89). He supervised the pickets (R. I 87) and was still doing duty as such at the time of the hearing before the board (R. II 19). The union provided bail and counsel (R. I 89).

> "On November 17, 1939, Thomas James, an employe of the Plankinton House was assaulted by Larry McAllen, a picket stationed at the hotel by the union, and said Larry McAllen was thereafter arrested, convicted and fined five dollars and costs" (Amended Finding 26, R. I 143-144).

James was a laundryman at the hotel. Between 3:30 and 4:00 o'clock on the day in question he left the hotel to go to the hospital to see his wife. McAllen, a picket, came up from behind, grabbed him, put him down on the sidewalk and started hitting him on the jaw. He pinned James' arms down with his knee so that he couldn't move and proceeded to kick and strike until a horse mounted policeman interceded (R. I 143-196). James had to see a doctor and have x-rays taken of his injuries. His jaw was badly bruised and he was still under a doctor's care at the time of the hearing before the board (R. I 143). O'Brien, named in Finding 23, and Larry McAllen were represented in court by the attorneys for the unions. (R. 88, 89). These attorneys represented all the pickets in court who were arrested and charged with violence (R. I 88, 89).

> "Throughout the strike, the City of Milwaukee caused to be stationed at the Plankinton House throughout the twenty-four hours of each day, six police offi-

cers for the purpose of maintaining order" (Finding 27, R. I 197).

In spite of such police supervision these assaults occurred (R. II 32).

Ward Whitney, a bus boy at the hotel, on November 18, when leaving the hotel around 4:30 o'clock in the afternoon, and while on the sidewalk in front of a tavern next to the hotel, was accosted by a picket who jumped on his back and said, "So you work at a scab hotel do you?" Whitney said nothing. The picket struck him several blows. A policeman came and the picket escaped by running up an alley (R. I 150-151, 152). Whitney took a car home and after leaving the car and while walking home he met two fellows. He was asked if he still worked at the hotel. Upon his response that he did, he was told, "Now you're going to get it." One of the fellows doubled his fist and hit Whitney with his clenched fist four or five times on his face and chest (R. I 151, 152, 153) and the other fellow jumped on his back. Whitney knocked one fellow down and succeeded in throwing the other fellow on the sidewalk. He then ran home.

Fr l Langdon, a valet at the Plankinton House, on November 11, 1939, stopped in at a tavern next door for a couple of glasses of beer. Two fellows came over to him and told him that they understood he was working at the laundry. He told them he wasn't. The other fellow started to talk to him and when Langdon turned to talk to the second man who engaged him in conversation, the first slugged him and hit him on the chin and on the back. When Langdon turned toward his first assailant the other fellow then slugged him on the other side of the face. Langdon

was told to let that be a lesson to him. The men then left by the back door (R. I 148). Langdon was a cripple, having a stiff left arm which he could raise but which he could not bend at the elbow. He did not strike back (R. I. 149).

On November 5, Harvey Weber and another employee tried to make a delivery of clean wash by automobile from the Plankinton Hotel to the Kilbourn Hotel. There were only two pickets at the door at the time. As he walked outside four, five or six men came across the street, got into the picket line and started parading around in line so that it was impossible to drive a car up to them. The management decided not to attempt the delivery (R. I 142). Charles McLaughlin jumped upon the stoop and hollered at James Myrick, told him he was a "dirty rat" and a "scab" and stated, "We'll get you later." (R. I 139, 142) There were ten or twelve pickets there at the time (R. I 139).

On November 13, a junk dealer came to the hotel to carry away some bales of waste paper (R. I 140). Charles McLaughlin talked to the driver for ten or fifteen minutes. The driver then said that he wouldn't haul the paper away because he didn't want to get into trouble. McLaughlin hollered vile statements and names at Harvey Weber, steward at the hotel, who had brought up the bales of waste paper for loading (R. I 140).

James O'Brien (named in Finding 23) on November 16, while on picket duty, spit upon Lester Raasch, a bellboy while he was holding the doors open for some engineers to enter the hotel (R. I 135, 136). This same O'Brien had previously told Raasch that if he came outside he would beat him up (R. I 136).

On November 6, O'Brien spit in the face of James Myrick while he was holding the door open for some Purdue University engineering students to enter (R. I 141). The pickets tried to prevent Myrick from entering the Plankinton street entrance to the hotel (R. I 142). One or two of them offered to fight with him a couple of times. Myrick did not respond (R. I 142).

On November 9th, Elmer Hunt, supervisor of the Plankinton Hotel parking lot, passed Thomas O'Maher and said "hello" to him. The response was a vile insult directed at him (R. I 146).

The pickets called, hissed and sneered at guests all day and all night to an extent that it could be heard from inside offices of the hotel (R. I 158). They ate peanuts and threw the shells at the entrance. Guests complained. When the hotel cleaned the entrance the same thing would occur right over again. It was a hopeless task, keeping the entrances clean (R. I 158). Guests and the Chamber of Commerce complained to the police with respect to the booing (R. I 196-197).

On November 13, 1939, Mr. Goldberg, one of the attorneys for the unions endeavored to get the Business Institute of Milwaukee, occupying some nine rooms of space in the hotel, to break its lease with the hotel (R. I 121, 122). Goldberg advised that students of this institution, members of the office workers' union, *could not go through the picket line* (R. I 121, 122, 123); that there was not a court in town that would sustain the hotel if the institute broke its lease under the conditions (R. I 122) as the students could not get into class because of the strike (R. I 123). Following this conversation the president of the institute,

teachers and students were all booed and hissed by the pickets and a lot of nasty remarks made to them (R. I 123-124).

On November 11, 1939, after the strike had been in progress for some nine days, the unions' effort to adjust is evidenced by the business manager's letter of November 11 (Ex. 12) in which demand was made (1) that the Company execute the same supplemental agreement which the other hotels had agreed to and (2) that the Company give all employees in Local 122 a uniform 10 per cent raise over and above what any other hotel in Milwaukee was paying.

On November 28, 1939, the union wrote the Plankinton House Company that under the terms of the contract they could hire no new employees except from the union and that the employees so hired would refuse to work (Ex. 13).

About two weeks before December 11, 1939, shingle nails were spread about the parking lot on several occasions and after pickets, ranging to ten in number, were standing near said lot (R. I 146-147, Ex. 20)*.

On November 19 a stench bomb was found in the hotel. The liquid had been generously distributed along about thirty feet of the hallway immediately adjacent to some of the dining rooms (R. I 156, 157). For two or three days following the odor that penetrated from the acid was such that quite a few of the students attending the business institute were nauseated and had to go home (R. I 122).

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*The petitioners complain that they were not definitely connected with this and the occurrences mentioned in the two paragraphs following. Be that as it may, both the Circuit Court and the Supreme Court clearly had a right to consider such occurrences in determining whether the order of the board was properly adjusted to the concrete factual situation presented to the board. Milk Wagon Drivers Union of Chicago, Local 753, et al., v. Meadowmoor Dairies, Inc. 312 U. S. 287, 61 S. Ct. 552, 85 L. ed. 497 (Adv. Op., 1941).

The odor was still present in the hotel at the time of the hearing before the board. (R. I 157). Following this occurrence, the company felt obliged to hire private help to protect its property (R. I 205).

On November 26, 1939 the rear elevator window on the main floor was broken by a large stone having been thrown through it (R. I 157, Ex. 22 and 23).

6. The formation and recognition of the Independent Organization of Plankinton House Company employees

148 out of 188 former employees had returned to work and were employees of the company at the time of the hearing before the board (R. I 158).

Following the strike the company employees formed an independent union known as the Independent Organization of the Plankinton House Company Employees (R. I 81, R. II 21-32). The first organization meeting was on November 21. Approximately a week thereafter the union claimed to have a majority of the employees (R. II 25). The union demanded that the company recognize it as the bargaining representative and presented proof that it did represent the majority of employees (R. II 25, 26, 27). On December 1, 1939 the company recognized the union as the voluntary bargaining agent (R. II 25).

This union intervened in the unfair labor practice hearing before the board and petitioned the board to hold an election to determine its bargaining status, pursuant to the provisions of sec. 111.05, Stats. (R. I 81, 82). The union was permitted to intervene and the representation petition was heard as a part of and at the same time as the

hearing upon the company's charge of unfair labor practices. The board ordered an election (R. II 39). The election was conducted by the board and resulted in 134 votes in favor of the Independent and four votes against (R. II 39). The board, on March 6, 1940 accordingly certified the Independent as the exclusive bargaining representative (R. II 39-40). The unions petitioned for review of these representation proceedings pursuant to the provisions of sec. 111.05 (3), Stats.*

This review proceeding came on for hearing before the circuit court for Milwaukee county, together with the hearing upon petition for review of the board's order in the unfair labor practice case. The court confirmed and approved (R. II 47, R. I 45, 47).

ISSUES PRESENTED BY THIS REVIEW —DISPOSITION OF SUCH ISSUES BY THE COURT BELOW

1. Does sec. 111.06 (2) (e) of the Employment Peace Act, as construed by the Supreme Court of the State of Wisconsin and when read in the light of other provisions of the act, violate the 14th amendment to the Constitution of the United States; either as to (a) depriving the petitioners of freedom of speech or (b) denying them the equal protection of the laws?

2. Does the order deprive the petitioners from exercising the constitutional right of freedom of speech, press

*Sec. 111.05 (3), insofar as material, provides:

"The board's certification of the results of any election shall be conclusive as to the findings included therein unless reviewed in the same manner as provided by subsection (8) of section 111.07 for review of orders of the board."

and assemblage under the 14th amendment to the constitution of the United States?

As will be seen from examination of the petition for review (R. I 2-6) and the able and exhaustive decision of the Circuit Court (R. I 12-47), the petitioners raised many legal questions, constitutional and otherwise, in the Circuit Court. Upon appeal to the Supreme Court, the petitioners abandoned all questions presented to the Circuit Court except the constitutionality of sec. 111.06 (2) (e) under the 14th amendment (1) because the statute deprived them of freedom of speech and (2) because it denied them the equal protection of the laws and (3) the further point that the order deprived the petitioners of the constitutional right of freedom of speech under the 14th amendment. Error was assigned in the supreme court as set forth below.*

The act as a whole was not challenged. This is specifically pointed out several times by the Supreme Court in its opinion (R. II 53, 70-71). The act as a whole (not the constitutionality of it) was before the Supreme Court of the state and is before this Court only because all relevant sections of the act must be considered and given their full force and effect in determining whether sec. 111.06 (2) (e)

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*(1) The Circuit Court for Milwaukee County erred in affirming that order of the Wisconsin Employment Relations Board requiring the appellant Unions, their officers, members, agents, successors and assigns, to cease and desist from engaging in promoting or inducing picketing at or near the Plankinton House or Kilbourn Hotel and from boycotting in any way the Plankinton House for the reason that:

(a) Section 111.06 (2) (e), upon which such order is based, is unconstitutional, void and of no effect whatsoever, being contrary to the Fourteenth Amendment to the Constitution of the United States and Article I of the Constitution of the State of Wisconsin.

(b) Such order deprives the Unions, their officers, members and agents from exercising the constitutional rights of freedom of speech, press and assemblage, guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I of the Constitution of the State of Wisconsin.

of the act, as construed by the Supreme Court of the state of Wisconsin is violative of the 14th amendment for the reasons assigned by petitioners.

The Supreme Court in substance construed the terms used in sec. 111.06 (2) (e) to comprehend only violent, intimidating or coercive picketing, boycotting and other overt concomitants of a strike by persons acting in concert; decided that these terms, as used in said section, could not be construed to deny a minority the right to picket peacefully or exercise the right of freedom of speech; that sec. 111.15 of the statutes forbade any such construction and any such application of the section; that the section was not violative of the 14th amendment as denying the equal protection of the laws and that the order of the board in the light of the factual situation did not deprive the petitioners of any constitutional right of freedom of speech under the 14th amendment.

SUMMARY OF ARGUMENT

POINT I.

SEC. 111.06 (2) (e) OF THE ACT, AS CONSTRUED BY THE STATE SUPREME COURT AND READ IN THE LIGHT OF ALL RELEVANT PROVISIONS IS NOT VIOLATIVE OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AS DEPRIVING THE PETITIONERS OR ANY MINORITY OF THE EXERCISE OF THE RIGHT OF FREEDOM OF SPEECH.

The petitioners' entire argument against the validity of sec. 111.06 (2) (e) is grounded upon a construction of that section repudiated by the State Supreme Court, —a construction which that Court says the statute will not bear. Petitioners' real quarrel with the decisions under review is a quarrel with the Supreme Court's construction of the statute. This raises no federal question. The construction of the statute by the Supreme Court of the State is as much a part of the statute as if the words were expressly written therein. That construction is not assailable here.

The Wisconsin Supreme Court in substance construed sec. 111.06 (2) (e) and the terms used therein to comprehend only violent, intimidating or coercive picketing, boycotting and other overt concomitants of a strike by persons acting in concert; decided that said section, when read in the light of sec. 111.15, could not be construed to deny a minority the right to peacefully picket or exercise the right of freedom of speech and that sec. 111.15 forbade any such construction.

The challenged section as construed does not deprive petitioners or minorities of freedom of speech

guaranteed by the 14th amendment as it regulates only conduct which falls outside of that area.

The petitioners not only misconstrue the challenged section but the argument made against the constitutionality thereof, however construed, is such an all-out argument for freedom of speech as an absolute right as to leave the legislatures of the several states completely powerless to cope with the problem of concert of action directed at the infliction of intentional injury upon another, either with respect to unlawful object or unlawful means, if speech is an implementing or an enmeshed medium by which the unlawful object is sought to be reached or by which the unlawful means are made effective. The principles for which petitioners contend are so utterly vicious as to destroy any society which harbors them. The cases cited to support the argument, such as the *Thornhill*, *Carlson*, *Swing*, etc., cases, are not of any such far reaching import.

Because of the construction placed upon the challenged section by the Supreme Court of Wisconsin there is no occasion for this Court to appraise the substantiality of the need for it but even if there is such occasion, it is manifest that there was and is a substantial need because of (1) the power given to labor under prior state legislation, (2) the abuse of this power by labor, (3) the bitter struggle then and now being waged within the ranks of organized labor,—the AFL-CIO conflict, (4) problems which arose out of new acts beneficial to organized labor such as the National Labor Relations Act and the State counterpart thereof, and (5) facts known to all with respect to the functioning of organized labor including peaceful picketing used as an instrument to perfect and maintain a boycott.

For like reason there is no occasion for this Court to consider the Act as a whole for the purpose of examining the extent to which the Act manifests regard for the balancing of rights of all major interests but even if there is such occasion, it is apparent from an analysis of the Act that it does show a scrupulous legislative regard for the balancing of rights of all major interests. Regulation of the right of freedom of speech may be sustained in an act which does manifest care for the balancing of major interests where such regulation could not be sustained in an act which does not manifest such care. If the challenged section, as construed, touches even incidentally the area of exercise of the right of freedom of speech, any conceivable regulation involved in that area is of insignificant import when compared to the regulation sustained by this Court in the field of freedom of religious worship in *Minersville School District et al v. Gobitis*, 310 U. S. 586, 60 S. Ct. 1010, 84 L. ed. 1375. If there is any conceivable clash in the case at bar with the exercise of freedom of speech, it must be that of a clash between the power of the State to control violent, intimidating or coercive means as opposed to freedom of speech absorbing such power.

The Employment Peace Act is designed to meet many of the problems which arose under prior State laws as well as problems which arose out of the Congress enacting the National Labor Relations Act. The entire Act, except with respect to regulation of use of the all-union agreement, is grounded upon the principle of majority rule in an appropriate collective bargaining unit which is the foundation and cornerstone upon which the structure of the principle of collective bargaining is erected. Collective bargaining units are made elastic and are determined by the affected employees

themselves. The Act is much more carefully drawn to protect the rights of minorities in selecting their own units and to protect minority collective bargaining than is the National Act. The Act fosters and protects the right of labor to bargain collectively free from employer dominance and coercion just as completely as does the National Act.

The challenged section is not violative of the 14th amendment because of a threat or a fear of subsequent punishment with respect to the exercise of the right of free speech. The section can be no more subject to constitutional attack in this respect than the National Labor Relations Act.

POINT II.

SEC. 111.06 (2) (e) IS NOT VIOLATIVE OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AS DENYING TO PETITIONERS THE EQUAL PROTECTION OF THE LAWS.

Peititoners' argument against the constitutionality of the classification strikes at the very principle upon which the whole structure of collective bargaining is rested. The argument against the constitutionality of the classification is in essence that majority rule within an appropriate collective bargaining unit is constitutional classification for purposes of conferring benefits upon labor but that it is unconstitutional classification for purposes of making labor accept some responsibility in relation to the benefits conferred. It is grounded upon repudiation of all responsibilities that go with acts which recognize the principle of collective bargaining and seek to foster and protect it.

The majority in a collective bargaining unit does not determine whether a minority may exercise the right of freedom of speech. What the majority does do is to determine whether the conditions that prevail in their employment are such that coercive instrumentalities directed at injury of another by concert of action ought or ought not to be used to remedy them, whether the conditions that prevail are such as to justify such intentional injury and consequent injury of the affected employees. This determination is made upon the basis of the self interest of the affected employees,—the only practicable method whereby the legislature can determine such question. A determination of that question has nothing to do with the exercise of freedom of speech. It does have something to do with unjustifiable injury of another by combinations by use of coercion and the infliction of intentional injury by such use.

The classification is entirely similar to that of the National Labor Relations Act.

POINT III

THE ORDER OF THE BOARD, SUSTAINED AND ENFORCED BY THE COURTS OF THE STATE, DOES NOT INVADE PETITIONERS' CONSTITUTIONAL RIGHT OF FREEDOM OF SPEECH UNDER THE 14TH AMENDMENT.

The picketing *at or near* the hotels was set in a background of violence, force, fear, intimidation and coercion, all directed by and engaged in by the responsible officers of the petitioning unions in active charge of the campaign. The campaign was that of a continuously coercive thrust. It was continuously threatening, intimidating and coercive. It was aimed at and calculated to engender fears and to compel action in accordance with fears engendered. The case is ruled by the *Meadowmoor case*. Any peaceful picketing that there may have been in the case at bar was much more *enmeshed* with a campaign of violence, intimidation and coercion than was the picketing in the *Meadowmoor case*.

The order was narrowly adjusted to the factual situation presented to the board and dealt with by the courts of the State. The petitioners were not prohibited from picketing any place except *at or near* the hotels,—the place where the violent, intimidating and coercive campaign had been and was being waged.

The order is more narrowly drawn and adjusted to the factual situation dealt with than was the injunction in the *Meadowmoor case*. It is far less subject to misconstruction than was the injunction in that case. It does not prohibit advertising the facts of a labor dispute by any means whatsoever or at any place whatsoever except by use of picketing *at or near* the hotels. Petitioners' argument to the contrary is an insidious one

and seeks to place an organized boycott by combinations upon the same constitutional plane as picketing. The common denominator of any boycott is that of agreement by concert of action to withhold patronage or labor, or to refuse to perform services or purchase a product or products. An organized boycott cannot be discussed except in terms of use of intimidating or coercive means. The agreement by concert, which is the common demoninator of any boycott, is in no sense an exercise of the constitutional right of freedom of speech. Boycotting does not have its roots in the constitution as an exercise of the constitutional right of freedom of speech.

In sustaining the order of the board the courts of the State anticipated correctly this Court's holding in the *Meadowmoor case*. So did the board—but whether it did or did not is immaterial.

The trial Court's temporary stay order pending appeal to the Supreme Court of the State in no sense determined that it was unnecessary to prohibit picketing as prescribed by the order to eliminate from the case the coercive effect of past conduct or that similar conduct was not likely to be engaged in by petitioners at any propitious opportunity. At the time the stay was granted a stay pending appeal appeared to be a matter of right under Wisconsin law provided the appellants furnished bond as prescribed by the trial Court.

Both the trial Court and the Supreme Court grounded the validity of the order in question upon the violent, intimidating and coercive conduct which characterized the campaign as continuously threatening and coercive far more than did the Supreme Court of Illinois in the *Meadowmoor case*.

Even if the case at bar is not ruled by the *Meadowmoor case* the order of the board nevertheless is not violative of petitioners' right to freedom of speech under the 14th amendment as the picketing was directed to an unlawful object.

ARGUMENT

POINT I

SEC. 111.06 (2) (e) OF THE ACT, AS CONSTRUED BY THE STATE SUPREME COURT AND READ IN THE LIGHT OF ALL RELEVANT PROVISIONS IS NOT VIOLATIVE OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AS DEPRIVING THE PETITIONERS OR ANY MINORITY OF THE EXERCISE OF THE RIGHT OF FREEDOM OF SPEECH.

A. The petitioners' entire argument against the validity of sec. 111.06 (2) (e) is grounded upon a construction of that section repudiated by the State Supreme Court, —a construction which that Court says the statute will not bear.

Most of petitioners' argument is entirely beside the point in this Court because of the construction placed upon sec. 111.06 (2) (e) by the Supreme Court of the State. The arguments advanced by the petitioners in their brief were apropos when addressed to the State Supreme Court and before that Court had construed the challenged section. They are not apropos here.

Sec. 111.06 (2) (e), the challenged section, provides that it shall be an unfair labor practice

"To cooperate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employes of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike."

Sec. 111.15 of the act provides:

"Except as specifically provided in this chapter, nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything in this chapter be so construed as to invade unlawfully the right to freedom of speech. And nothing in this chapter shall be so construed or applied as to deprive any employe of any unemployment benefit which he might otherwise be entitled to receive under chapter 108 of the statutes."

The petitioners took the position in the State Supreme Court, and still take the position here, that the challenged section, sec. 111.06 (2) (e), must be read in complete disassociation from all other provisions of the act; that in spite of the express mandate of sec. 111.15 of the Act and in complete disregard thereof, the challenged section *must be construed* so as to deprive them and minorities of exercise of the right of freedom of speech guaranteed by the 14th amendment.

The Wisconsin Supreme Court, both in the original opinion and in the opinion upon motion for rehearing, expressly repudiated any such construction of the challenged

section. The Supreme Court held in substance* that the terms used in sec. 111.06 (2) (e) comprehended only violent, intimidating, or coercive picketing, boycotting and other overt concomitants of a strike by persons acting in concert; that these terms, as used in said section, could not be construed to deny to a minority the right to peacefully picket or exercise the right of freedom of speech and that sec. 111.15 of the statutes forbade any such construction.

After filing of the original opinion and on motion for rehearing, the petitioners still continued to misconstrue the challenged section and to argue deprivation of constitutional rights based upon such misconstruction. This appears very clearly from the court's opinion upon motion for rehearing from which we quote:

> "Rosenberry, C. J. (*on motion for rehearing*). On this motion appellants open their argument with the following statement:
>
> "'Since receipt of the supreme court's decision we have gone over it carefully and searchingly in order that we might have a clear and precise understanding of the basis for such decision.
>
> "'Only one thing was clear. That was that the Wisconsin supreme court, traditionally liberal and traditionally alert to protect the civil liberties of the citizens of this state, had placed its stamp of approval upon a statute, and an order based thereon, prohibiting minority groups from engaging in those rights guaranteed by the constitution of the United States. This for the sole reason that they were minority groups.'

*The supreme court opinions are analyzed in this brief, pp. 46-51.

"* * * It is almost futile to attempt to reply to a contention of this kind in the face of the provisions of the statute and the explicit language of the opinion. Counsel continue to misinterpret the statute and, as a consequence, misunderstand the opinion." (p. 352)* (R. II 69)

"* * * We pointed out—

"'In this case it is undisputed that numerous assaults were committed by pickets; that the pickets acted in concert; that the fines of these pickets were paid by the unions; that ingress and egress to and from the premises of the employer were prevented by force and arms. It was at conduct of that kind that the statute was aimed. It is conduct of that kind that is dealt with in this case. It is conduct of that kind that is declared to be an unfair labor practice by the statute, and from which the defendants are ordered to cease and desist. The statute does not even declare conduct of that kind to be unlawful, nor does it subject the offender to a criminal prosecution.'

"How this can be tortured into a statement that minority groups are, by the order affirmed in this case, prohibited from peaceful picketing as described in the *Thornhill case*, is beyond our understanding. Under the statute and the order of the board as interpreted and construed by the explicit language of the opinion, freedom of speech and the right peacefully to picket is in no way interefered with. * * *" (p. 353) (R II 70).

"* * * We did not attempt, because it was not involved in this case, to distinguish between what a majority group may do in carrying on a strike from what the minority group may do. We pointed out that the

*Refers to page of official Wisconsin Reports

statute nowhere prohibited employees from withdrawing from their employment either singly or in groups and certainly it in no way interferes with the right of free speech. Par. (e), as construed, does not prohibit, as described in the *Thornhill case*, peaceful picketing. * * *" (p. 353-354). (R. II 71).

"* * * The picketing carried on in this case was not peaceful and the right of free speech is in no way infringed by the statute or the order of the board." (p. 354). (R. II 71).

The petitioners are now in this Court still misconstruing the statute and still arguing deprivation of constitutional rights of freedom of speech under the 14th amendment, based upon a construction of the challenged section expressly repudiated by the highest Court of the State,—just as if the challenged section were before this Court for construction as an initial proposition and without the High Court of the State ever having passed thereon.

B. It is apparent from petitioners' argument that their real quarrel with the decisions under review is a quarrel with the Supreme Court's construction of the statute—such criticism raises no federal question.

In connection with petitioners' argument that sec. 111.06 (2) (e) unlawfully deprives them of the right of freedom of speech guaranteed by the 14th amendment (pp. 25-30 of petitioners' brief), petitioners' contention is that the Court erred in not testing this particular section upon its face wholly and completely disassociated from all other provisions of the act and wholly and completely disassociated from sec. 111.15 of the act, which latter section by its express language, prohibits any construction of this section of the act or any other section of the act so as to invade unlawfully the right of freedom of speech.

On p. 29 of petitioners' brief it is stated:

> "* * * And although the Wisconsin Supreme Court in its opinion states specifically that it was concerned only with Section 111.06 (2) (e) of the Wisconsin Statutes, it, nevertheless, did not test such statute on its face, but apparently sought to ground its opinion on other provisions of the law such as Section 111.06 (2) (f), which makes it an unfair labor practice to engage in threats, intimidation, force, or coercion. Yet Section 111.06 (2) (f) was not in the case, did not afford the basis for the order of the Board, and the Wisconsin Supreme Court expressly stated that it was Section 111.06 (2) (e) with which it was concerned and no other section."

The Court did not ground its opinion upon sec. 111.06 (2) (f). The Court simply construed sec. 111.06 (2) (e)

to comprehend within its terms only violent, intimidating or coercive picketing, boycotting and other overt concomitants of a strike by persons acting in concert.

Again on p. 54 of petitioners' brief it is stated:

> "It is regrettable that the *Meadowmoor* decision of this Court has been utilized by justices who have refused to accept the principles pronounced in the Norris-La Guardia Act and in the *Swing* case, or who have sought to *construe* statutes to death for the purpose of overcoming and defeating the decisions in the Thornhill, Carlson and Swing cases."

This and like argument found elsewhere in petitioners' brief obviously presents no federal question. The Supreme Court of the state is the final authority upon construction of the challenged section. Petitioners have no constitutional right that we know of to have a statute construed as they contend it must be construed to the end that a serious constitutional quesion will be presented.

1. The Supreme Court of the State merely took the traditional approach of the judiciary toward any question of statutory construction where constitutional rights are involved, namely that of adopting a construction which would not present any grave question of constitutionality, of saving and not destroying even though the interpretation arrived at might not be the most obvious interpretation.

The cardinal principle of statutory construction is to save and not to destroy. In *National Labor Relations Board v. Jones & Laughlin*, 301 U. S. 1, 30, 57 S. Ct. 615, 81 L. ed. 893 (1937) this Court said:

> "* * * The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same. *Federal Trade Comm. v. American Tobacco Co.*, 264 U. S. 298, 307; *Panama R. Co. v. Johnson*, 264 U. S. 375, 390; *Missouri Pacific R. Co. v. Boone*, 270 U. S. 466, 472; *Blodgett v. Holden*, 275 U. S. 142, 148; *Richmond Screw Anchor Co. v. United States*, 275 U. S. 331, 346."

This rule likewise applies even though a different construction would be more obvious or natural.

State of Wisconsin ex rel. Wisconsin Development Authority, et al. v. Dammann, 228 Wis. 147, 280 N. W. 698 (1938);

Petition of Breidenbach, 214 Wis. 54, 62, 252 N. W. 366 (1934);

Johnson v. City of Milwaukee, 88 Wis. 383, 60 N. W. 270 (1894).

No case has been directed to our attention, nor do we know of any, where this Court has ever held that this traditional approach of the judiciary to a problem of statutory construction involving constitutional rights must be departed from in the field of civil liberties and that in such field the Courts are in duty bound to so construe a statute as to render it subject to constitutional attack or so as to present a serious constitutional question.

Petitioners' real quarrel and criticism of the Court is obviously directed at the Court's interpretation of the statute. That presents no federal question.

C. The Wisconsin Supreme Court in substance construed sec. 111.06 (2) (e) and the terms used therein to comprehend only violent, intimidating or coercive picketing, boycotting and other overt concomitants of a strike by persons acting in concert; decided that said section, when read in the light of sec. 111.15, could not be construed to deny a minority the right to peacefully picket or exercise the right of freedom of speech and that sec. 111.15 forbade any such construction--analysis of the decisions.

Analysis of either the original decision of the Court or its decision on motion for rehearing will support no other interpretation than that set forth above.

With reference to the statute involved in the *Thornhill case* the court said,

"* * * As construed by the state court it prohibited

the publicizing of the facts of a labor dispute whether by printed sign, by pamphlet, by word of mouth, or otherwise. The peace act deals with concert of action in carrying on an unauthorized strike by the usual overt acts concomitant of a strike." (p. 340-341) (R. II 55).

"* * * The peace act expressly provides that it shall not be so construed as to impair the right of free speech. * * * The right to speak freely is guaranteed by the constitution, but that right, the same as other rights guaranteed by the constitution, is subject to limitations. In the exercise of that right one is not free from liability for libel, duress, or fraud, although speech was the agency in each case. *John F. Jelke Co. v. Beck* (1932), 208 Wis. 650, 242 N. W. 576; *Wisconsin Labor R. Board v. Fred Rueping L. Co.* (1938) 228 Wis. 473, 279 N. W. 673. See also *Schenck v. United States* (1919), 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470; *Gitlow v. New York* (1925), 268 U. S. 652, 45 Sup. Ct. 625, 69 L. ed. 1138." (p. 341) (R. II 55)

"* * * The fact that any employee in the course of doing the designated acts may use speech as a means of carrying on his activities, does not bring the acts within the protection of the constitutional guaranties of free speech. The term 'picketing,' as used in sub. (2) (e), sec. 111.06, Stats. 1939, does not include acts held in the *Thornhill Case, supra,* to be within the protection of the constitutional guaranty of the right of free speech. The express language of the act forbids such a construction. It clearly refers to that kind of picketing which the *Thornhill Case* says the state has power to deal with 'as a part of its power to preserve the peace, and protect the privacy, the lives and the property of its residents.' " (p. 341-342) (R. II 56)

"As already pointed out, the Wisconsin statute expressly provides that it shall be so construed and applied that it shall not interfere with the right of free speech. As we understand and construe the statute, the right of free speech is not interfered with. The conduct complained of in this case, and described as 'picketing,' was not the sort of conduct that was indulged in by the defendant in the *Thornhill Case*, *supra*. The conduct complained of in this case and dealt with by the board and by the court was of an entirely different character. It was mass picketing, organized and carried on by the unions supplemented by boycott and violence, and was clearly within the exception stated in the *Thornhill Case* warranting state action. In that case the supreme court of the United States said (p. 105):

> "'We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger.'

"Ch. 111, Stats. 1939, is a statute of that character. We do not understand the decisions of the United States supreme court to mean that there can be no regulation of the right of picketing. That court has not yet said that a person who goes upon the premises of another for the purpose of creating a disturbance and disorganizing the other's business, is protected in the doing of such acts by the constitutional guaranty of free speech. In this case it is undisputed that numerous assaults were committed by pickets; that the pickets acted in concert; that the fines of these pickets were paid by the unions; that ingress and egress to and

from the premises of the employer were prevented by force and arms. It was at conduct of that kind that the statute was aimed. It is conduct of that kind that is dealt with in this case. It is conduct of that kind that is declared to be an unfair labor practice by the statute, and from which the defendants are ordered to cease and desist. * * *" (p. 343-344) (R. II 57, 58)

"* * * When a person is found guilty of an unfair labor practice he loses the benefit of sec. 103.53, Stats. 1939, which prescribes what acts, whether performed singly or in concert, shall be legal in the conduct of a labor dispute. * * *" (p. 345) (R. 58, 59)

"* * * But if they attempt to *coerce* their employer by concerted picketing, a boycott, or by any other similar overt act concomitant of a strike, they will be guilty of an unfair labor practice as defined in the act. We say similar overt act because the maxim of *ejusdem generis* applies. *Chicago & N. W. R. Co. v. Railroad Comm.* (1916) 162 Wis. 91, 155 N. W. 941." (Italics ours) (p. 345-346) (R. II 59)

"* * * Less than a majority may strike, but they will be under the restrictions of the statutes as to the methods of coercion which they may use. Sec. 103.53 specifies with particularity what may be considered legal in the conduct of a labor dispute. These enumerated means striking employees not guilty of an unfair labor practice are at liberty to employ. Any court or judge is forbidden to restrain the doing of such acts when done in connection with a labor dispute. The sole difference between *coercive acts* in support of a strike which has been called by a majority of members of a collective-bargaining unit and one which has not been so called is that the members of a minority group do not have the benefit of sec. 103.53, that is, by in-

> dulging in an unauthorized strike they lose their privileges under that section and are subject to the provisions of ch. 111, Stats. 1939, relating to unfair labor practices. The character of their *coercive acts* must then be determined either by submitting the controversy to the board or by 'the pursuit of legal or equitable remedies in courts of competent jurisdiction.' * * *" (Italics ours) (p. 347-348) (R. II 60, 61)

Referring to sec. 103.51, et seq., Stats. of 1937 (the State Labor Code) and the cases decided thereunder the Court says:

> "* * * All these questions relating to rights of employees to organize, conduct strikes, *boycotts, and other coercive measures* are in the field of public policy. As the court of appeals of New York said in the case already cited, and as this court has said many, many times, these questions are for the legislature. Courts do not sit to pass upon the wisdom or unwisdom of the acts of the legislature. * * *" (p. 350) (R. II 63)

Again, on motion for rehearing and in response to the petitioners' claim that the court had placed its stamp of approval upon a statute and an order based thereon prohibiting minority groups from engaging in rights guaranteed by the constitution of the United States and this for the sole reason that they were minority groups, the Court pointed out that it was almost futile to attempt to reply to such a contention in the face of the specific provisions of the statute and the specific language of the opinion; that counsel continued to misinterpret the statute and as a consequence misunderstood the opinion. The Court again points out and quotes the language of sec. 111.15 of the

statutes prohibiting any such construction (p. 352) (R. II 70)

> "Except as specifically provided in this chapter, nothing therein shall be construed so as to *interfere with or impede or diminish in any way the right to strike* * * *; nor shall anything in this chapter be so construed as to *invade unlawfully the right to freedom of speech.*"

and specifically states: (p. 354) (R. II 71)

> "* * * The picketing carried on in this case was not peaceful and the right of free speech is in no way infringed by the statute or the order of the board."

See also the other forceful language to the same effect quoted on pp. 41-43 of this brief.

1. This construction of the statute by the Supreme Court of the State is as much a part of the statute as if the words were expressly written therein—that construction is binding upon this Court.

The highest court of the State of Wisconsin has construed sec. 111.06 (2) (e) in conjunction with sec. 111.15 and sec. 111.17 of the Wisconsin Statutes exactly as if the said section read that it shall be an unfair labor practice

> "To act in concert in engaging in promoting or inducing intimidating or coercive picketing, boycotting or any overt concomitant of a strike beyond the exercise of the constitutional right of free speech, unless a majority in a collective bargaining unit of employees of an employer, against whom such acts are primarily

directed, have voted by secret ballot to call a strike even though such conduct is elsewhere recognized in the statutes as lawful intimidation or coercion."

This construction is as much a part of the statute as if it were expressly so worded. A decision construing a statute becomes an integral part of the statute itself.

Gulf, C. & S. F. R. Co. v. Moser, 275 U. S. 133, 48 S. Ct. 48, 72 L. ed. 200 (1927).

In *Milwaukee Co. v. City of Milwaukee*, 210 Wis. 336, 341, 342, 246 N. W. 447 (1933) the Wisconsin court quoted with approval from this court's decision in the *Gulf, C. & S. F. Co. case, supra*, as follows:

"A decision construing a statute becomes an integral part of the statute itself. *Gulf, C. & S. F. R. Co. v. Moser*, 275 U. S. 133, 48 Sup. Ct. 49. When a statute has been once construed by the court, it remains as construed until it is amended by the legislature or the construction given is modified or changed by the court. The statute under consideration has never been amended by the legislature since it was construed by the court, nor has the court ever in any way modified or limited the construction given. * * *"

It is axiomatic that the construction placed upon a State statute by the highest court of the State is binding and controlling upon this Court and is not subject to review in this Court.

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188;

Lauf v. E. G. Shinner & Co., 303 U. S. 323, 82 L. ed. 872 (1938);

Senn v. Tile Layers Protective Union, 222 Wis. 383, 268 N. W. 270 (1936);

Minnesota v. Probate Court, 309 U. S. 270, 273.

D. The challenged section as construed does not deprive petitioners or minorities of freedom of speech guaranteed by the 14th amendment as it regulates only conduct which falls outside of that area.

Conduct in relation to means employed falls within three areas (1) violence (2) intimidation or coercion and (3) exercise of the constitutional right of freedom of speech. Violence (area 1) is unlawful conduct everywhere. Intimidating or coercive conduct (area 2) clearly falls within an area which is subject to regulation by the states. Regulation within this area does not present any question of invasion of the constitutional right of freedom of speech under the 14th amendment as the regulation is in relation to conduct which falls outside of that area. Conduct which falls within the area of exercise of the constitutional right of freedom of speech (area 3) is not regulated by the section. The section regulates *means* which fall outside of area 3.

1. The petitioners not only misconstrue the challenged section but the argument made against the constitutionality thereof, however construed, is such an all-out argument for freedom of speech as an absolute right as to leave the legislatures of the several states completely powerless to cope with the problem of concert of action directed at injury of another so long as speech is a factor in accomplishing the injury—the principles for which petitioners contend are so utterly vicious as to destroy any society which harbors them.

It is asserted in petitioners' brief on pp. 25, 80 that the case presents no question of the legality of object. The case does present a question of legality of object (the point is briefed, pp. 144-145 of this brief) but whether the case does or does not present such question, it is apparent from petitioners' argument upon the absoluteness of the constitutional right of freedom of speech that there is no scope for exercise of legislative power to deal with the problem of concert of action directed at injury of another either with respect to unlawful object or unlawful means if speech is an implementing or enmeshed medium by which the unlawful object is sought to be reached or by which the unlawful means are made effective. When the right asserted is analyzed down to its essentials it is apparent that it is nothing less than that of the right of combinations to direct all of their ruinous and destructive* activities against anyone with whom the combination disagrees, under *any* and *all* circumstances, so long as the end sought is a justifiable end *in the eyes of the combination* and speech is the medium

*Unless otherwise indicated herein the term "destructive" does not refer to actual physical destruction.

or an implementing or enmeshed medium by which the injury is sought to be accomplished. This means that the legislature is powerless to cope with all manifestations of abuse of economic power by combinations,—powerless to determine under any circumstances when such intentional injury is and when it is not justifiable conduct. This is indeed a far reaching concept. It strikes at the very foundation of our society.

2. The cases cited to support the argument obviously are of no such far reaching import—analysis of the cases.

The petitioners cite *Thornhill v. State of Ala.*, 310 U. S. 88, 60 S. Ct. 736, 84 L. ed. 659 (1940); *Carlson v. State of Calif.*, 310 U. S. 106, 60 S. Ct. 746, 84 L. ed. 668 (1940) and *A. F. of L. v. Swing*, — U. S. —, 85 L. ed. 513 (Feb. 10, 1940) and other cases as sustaining their position that the challenged section of the statutes violates the constitutional guarantee of freedom of speech. The cases cited deal with very narrow questions. The decisions are specifically confined to the very narrow question dealt with in each decision.

In the *Thornhill case* the statute in question was so comprehensive in terminology as to comprehend "every practicable method whereby the facts of a labor dispute may be publicized in the vicinity of the place of business of an employer" whatever the merits of the dispute, however right the workers may have been and however wrong the employer may have been, however lawful the object of the workers, however unjustifiable the employer's refusal to bargain or meet the demands of the union or work-

ers with respect to that object, and however accurate and open and above board the expression of the workers in relation to that object.

This Court stated that the statute had to be tested upon its face (it was also tested in the light of the State Supreme Court's construction of the statute) and so testing it, the court found that it was so broad in terminology that it swept "within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press," that the statute was "a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." This Court's approach to the narrow question presented in the *Thornhill case* was that of a traditional approach to freedom of discussion and publicizing of ideas to discover and spread political and economic truth to the end that noxious doctrines in those fields may be refuted and their evil asserted by the courageous exercise of the right of free discussion,—the free competition of ideas in the open market of ideas. The statute upon its face prohibited the exercise of such right. It was accordingly struck down as unconstitutional. The Court says:

> "The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, *the nature of their dispute with an employer*, or the restrained character and the *accurateness of the terminology used in notifying* the public of the facts of the dispute."

Insofar as the statute dealt with picketing the Court says, "The vague contours of the term 'picket' are nowhere delineated." In the footnote the Court cites various activities that a picket may engage in. Some of those activities involve mere peaceful persuasion, with or without concert and without any enmeshment with factors which convert to the field of coercion,—which convert to an actual manifestation of force. For the first time in its history this Court recognized that the activities of a picket may take such a wide range, some of which are entitled to constitutional protection, that a *criminal* statute which proscribes all picketing and under any and all circumstances is too sweeping in its terms. A picket *may*, under the facts of a case, merely be exercising the right of freedom of speech.

Furthermore, in the *Thornhill case* the court states:

> "It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants. * * *"

The Court further says:

> "The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted."

The latter statement will also be found in the last paragraph of the opinion in the *Carlson case*.

There is implicit in every argument that petitioners make upon the issue of freedom of speech, the proposition that the State's police power to protect and preserve the peace *"and to protect the privac , lives and property of its residents"* is limited to that of protecting such privacy, lives and property from acts of physical violence. Since when did the police power of the State become so proscribed? Needless to state, no case is, or can be cited to the effect that the police power of the State is so limited.

The rationale of the *Carlson case* is identical to that of the *Thornhill case*. The *Carlson case* deals with a problem just as narrow in scope as that dealt with in the *Thornhill case*.

The *Swing case* deals with a very narrow question. This Court was not agreed as to just what, if any, question was presented by "the none too clear record." The decree of the appellate Court was:

> "* * * that this Court and the Supreme Court of this State have held in this case, that, under the law of this State, peaceful picketing or *peaceful persuasion* are unlawful when conducted by strangers to the employer (i.e., where there is not a proximate relation of employees and employer), and that appellants are entitled in this case to relief by injunction against the threat of such peaceful picketing or persuasion by appellees".

The majority of the Court felt that the record presented the question of the validity of the final decree of the appellate Court as above set forth. The Court states that all it has before it is a case of "peaceful persuasion." That "peaceful persuasion" was enjoined because those engaged

therein did not occupy the position of employees. The Court holds that:

> "* * * A state cannot exclude workingmen from peacefully exercising the right of *free communication* by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. * * *"

The Court does not discuss the term "picketing" in its analysis of the narrow issue. As the Court construed the question presented by the record, the record limited the Court to the bare question of whether "peaceful persuasion" (not enmeshed with other factors) could be banned if there were no employer-employee relationship. Obviously the question decided was a very narrow one.

None of the cases above analyzed deal with the problem of concert of action directed at injury to another. Nor do they deal with the facts of the particular case. They deal with statutes, ordinances or court decisions which upon their face *may* include within the ambit of the statute, ordinance or decision that which constitutes freedom of speech.

The decisions in nowise limit the law of unlawful conspiracy. Conspiracy is defined by Chief Justice Hughes in *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 84 L. ed. 1311 (1940) p. 1335 as follows:

> "* * * 'Conspiracy' is a familiar term of art and means a combination of two or more persons by concerted action to accomplish an unlawful purpose, or some purpose not in itself unlawful by unlawful means. * * * "

Wisconsin decisions are to the same effect. *Holtz v State*, 76 Wis. 99, 108, 44 N. W. 1107 (1890); See also: *Martens v. Reilly*, 109 Wis. 464, 84 N. W. 840 (1901); *Randall v. Lonstorf*, 126 Wis. 147, 105 N. W. 663 (1905); *Schultz v. Frankfort M., A. & P. G. Ins. Co.* 151 Wis. 537; 139 N. W. 386 (1913); *Judevine v. Benzies-Montanye Fuel & Whse. Co.*, 222 Wis. 512, 269 N. W. 295 (1936); *State ex rel. Durner v. Huegin*, 110 Wis. 189, 85 N. W. 1046 (1901), commencing at page 243. This latter case is again reported in *Aikens v. State*, 113 Wis. 419, 89 N. W. 1135 (1902). It later went to this Court and is reported in 195 U. S. 194.

In *Boyce v. Independent Cleaners, Inc.*, 206 Wis. 521, 527, 240 N. W. 132 (1932), which case involved an unlawful conspiracy, the Court well said:

> "• • • The gentle influence of law and custom will prove ineffective in the accomplishment of its noble purpose unless individuals with rights to preserve and protect can readily find a way to combat organized tyranny in the commercial world, just as certainly as will our political rights fade away unless we keep open the avenue to the tribunals for their public vindication. • • •"

Workers have been exempted to a considerable extent from the laws of unlawful conspiracy, either through legislative declarations of policy or in the absence thereof through the courts exercising the quasi-legislative function of determining policy. Dissenting opinion of Justice Brandeis in *Truax v. Corrigan*, 257 U. S. 312, 66 L. ed. 254, 27 A. L. R. 375, 401-403 (1921).

Concerted action by workers to enforce demands necessarily involves the infliction of intentional harm. The

privilege of workers by concert to inflict such harm has, in the recent development of the law, all revolved around the public policy of the States as to justification for such injury because of the self interest of workers in the economic conflict.

Restatement of Law of Torts, Vol. 4, pp. 94-97;

Truax v. Corrigan, supra;

Duplex v. Deering, 254 U. S. 443, 65 L. ed. 349 (1921).

Certainly within reasonable limits the legislature may withdraw the privilege both in relation to object and in relation to intimidating or coercive means. The *Thornhill case* specifically cited and with approval the following language of Justice Brandeis in the case of *Duplex Co. v. Deering*, 254 U. S. 443, 65 L. ed. 349 (1921):

> "Because I have come to the conclusion that both the common law of a State and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute pro-

cesses of justice for the more primitive method of trial by combat." (p. 488)

None of the cases analyzed support the proposition that combinations may engage in peaceful picketing where the object of the combination is to compel an employer to commit an unlawful act. There can be no justification in the law for such picketing even though the picketing as such is peaceful and as such is not of an inherently intimidating or coercive character. Concert to inflict injury under such circumstances cannot be characterized as other than concert to inflict malicious injury.

In *Aikens v. Wisconsin*, 195 U. S. 194, 205, this Court, speaking through Justice Holmes, said:

> "* * * But an act, which in itself is merely a voluntary muscular contraction, derives all its character from the consequences which will follow it under the circumstances in which it was done. When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts, when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."

In the Restatement of the Law of Torts, Chap. 38, Vol. 4, dealing with the subject of permissible conduct in

labor disputes, the authors carefully pointed out that announced rules as to the "privilege" of the workers to inflict economic loss in certain defined situations, regardless of whether the "object" has the support of a majority of the workers affected, was stated as the law only *"in the absence of applicable legislation to the contrary."*

> Restatement of the Law of Torts, Vol. 4, pages 120, 125, 126, 129, 140, 153, 156, 161.

The above observation must now be read in the light of the *Swing case*. We find no language in the *Swing case*, however, to indicate that concert of action directed at injury of another can never be subjected to legislative regulation either with respect to unlawful object or unlawful means if speech is an implementing or enmeshed medium by which the unlawful object is sought to be reached or by which the unlawful means are made effective.

Nor do we find any language in the decisions cited which can be taken as overruling the force or the legal soundness of the Restatement of the Law of Torts, Ch. 38, Sec. 495, p. 135, as follows:

> "An act by an employer which would be a violation of a legislative enactment or contrary to a defined public policy is not a proper object of concerted action against him by workers."

In the comment at page 136, the authors add:

> "* * * The expression of public policy is not confined to legislation and criminal law; in passing upon the propriety of an object, public policy otherwise defined is an important factor. *If the object is an act against*

which the law has definitely set its face, it is not a proper object of concerted action."

In connection with the foregoing, we call attention also to the following extracts from the general discussion of the "Significance of (the) object" of "concerted action." (id Topic 2, 117).

> "The object of concerted action is an important factor in determining liability or non-liability for harm caused by the action. Some conduct, for example, physical violence, may be unprivileged in any case. Other conduct, for example, economic pressure by peaceful persuasion or otherwise, may be privileged for one object, such as increase of wages, and unprivileged for another object, such as the committing of a crime. * * *"

Nor do any of the decisions in any wise effect the rule stated in the same work, sec. 775, as follows:

> "Workers are privileged intentionally to cause harm to another by concerted action if the object and the means of their concerted action are proper; * * *"

None of the cases cited support the proposition that picketing is entitled to constitutional protection as freedom of speech under the 14th amendment when it is used as an instrument of perfecting and maintaining a boycott. An organized boycott by concert of action obviously falls within the sphere of use of intimidating or coercive means to secure the meeting of demands. We can see no conceivable basis whereby it can be said that an organized boycott directed at coercing the meeting of demands made is entitled to constitutional protection as an exercise of freedom

of speech. Boycotting by concert of action obviously lies within the sphere of legislative policy. Economic pressure by way of an organized boycott, whether primary or secondary, is by no means a constitutional right. When picketing is used as an instrument of perfecting and maintaining a boycott, the area within which a picket may operate as an exercise of the constitutional right of freedom of speech has been far exceeded. There is nothing in any of the cases analyzed which indicate that picketing enmeshed with boycott as the instrument by which it is perfected and maintained is entitled to constitutional protection as an exercise of freedom of speech.

The freedom of speech which is subject to constitutional protection is that of speech as an "appeal to reason by all the peaceful means of gaining access to the mind." *Milk Wagon Drivers Union of Chicago, Local No. 753 v. Meadowmoor Dairies, Inc.*, (Feb. 10, 1941) 312 U. S. 287, 85 L. ed. 497. The free competition of ideas in the open market of public opinion (*Thornhill v. State of Ala.*, 310 U. S. 88, 84 L. ed. 1093 (1940)).

This Court in the *Meadowmoor case* was dealing only with picketing enmeshed with violence as a means of coercion. The Court throughout the opinion, however, speaks of the ample power of the State to deal with manifestations of force in the settlement of industrial conflicts and "the power of the states to prevent future coercion." It speaks of picketing removed from the coercive influence of force.

The *Meadowmoor case* very clearly expounds the doctrine that power is left in the states to deal with all *manifestations* of force. Manifestations of force are by no means confined to acts of violence. See for instance *Gompers v.*

Buck's Stove & Range Co., 221 U. S. 418, 55 L. ed. 797 (1911) where the court says:

> "The court's protective and restraining powers extend to every device whereby property is irreparably damaged or commerce is illegally restrained. To hold that the restraint of trade under the Sherman anti-trust act, or on general principles of law, could be enjoined, but that the means through which the restraint was accomplished could not be enjoined would be to render the law impotent.
>
> "* * * *
>
> "In the case of unlawful conspiracy, the agreement to act in concert when the signal is published, gives the words 'Unfair,' 'We don't patronize,' or similar expressions, a force not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called 'verbal acts,' and as much subject to injunction as the use of any other force whereby property is unlawfully damaged. When the facts in such cases warrant it, a court having jurisdiction of the parties and subject matter has power to grant an injunction." (pp. 438, 439)

To say that the legislature has the power to confer certain rights and to outlaw certain practices and at the same time deny the legislature the power to enjoin or prohibit the means by which the policy is thwarted, is in reality a denial of legislative power to act at all.

If the petitioners have the constitutional right to coerce, through organized economic pressure conduct of another in accordance with their wishes, under any and all circumstances, employers must have the same right under any

and all circumstances. The gains that labor has made in the industrial field as a result of passage of the National Labor Relations Act and the present Employment Peace Act directed at protecting labor in its right to organize and bargain collectively, free from employer dominance or interference, must fall by the wayside. If organized labor has the constitutional right to compel conduct in accordance with its wishes by use of economic pressure under any and all circumstances, the employer must have the same right. Many of the company unions that have been disestablished by National and State Boards because of employer dominance or interference have been disestablished on the basis of what the employer has said or done or what his employees have said or done, indicating coercive economic pressure to prevent the free exercise of the employees' right to organize and bargain collectively. If freedom of speech carries with it the right of economic coercion under any and all circumstances, it would seem apparent that many of the gains made by organized labor as a result of disestablishment of company dominated unions must become a thing of the past. The employer, under the banner of freedom of speech, must have the constitutional right to dominate and coerce by exercise of the same economic pressure.

The same argument applies to the employer's right to interfere and coerce through economic pressure and thus prevent formation of any labor organization within his plant so long as the economic pressure and coercion is exercised through the medium of speech.

Sec. 111.06 (1) (k) makes it an unfair labor practice for an employer "to make, circulate or cause to be circu-

lated a black list as described in sec. 343.682." If the petitioners' arguments are sound, the legislature is lacking in power to outlaw such black list practices.

None of the cases cited support the proposition that the State is without power to deal with violent, intimidating or coercive means through the concreteness of individual litigation rather than through the abstractions of a general law. In the last analysis this is all that the State has done in the enactment of the challenged section.

None of the cases cited support the proposition that picketing by combinations is entitled to constitutional protection where the object sought is to inflict economic loss upon employees for the purpose of compelling them to join a particular union. If freedom of speech encompasses such right as a constitutional concept, the concept will in the end be ruinous to labor itself. It will make labor the victim of organization rather than the beneficiary of it. Under the banner of freedom of speech, the AF of L would have the constitutional right to intentionally inflict economic loss upon every employee member of CIO and vice versa for the purpose of compelling them to surrender the affiliation of their choice and to join a union not of their choice. It is not difficult to envision the direction in which the acceptance of such a concept takes us.

Because of the clarity of expression and soundness of concept, we quote from a recent decision of Judge Aarons, Circuit judge for Milwaukee County, in the Golden Guernsey case entitled "Wisconsin Employment Relations Board, Petitioner, v. Milk and Ice Cream Drivers and Dairy Employees Union, Local No. 225, I. B. of T. C. S. & H. of A., Respondents: (3 Labor Laws 60,049).

"There is nothing in the language of *Thornhill v. Alabama*, 84 L. ed. (U. S.) 659 and *Carlson v. California*, 84 L. ed. 668, which implies that it is a violation of any provision of the constitution for a state to enact reasonable regulations providing for the pursuit of definite legal processes before tribunals created by law in matters pertaining to labor relations; and restraining concerted efforts in the use of economic pressure where such legal processes are not pursued. There is nothing in those cases that prevents the state from banning combinations formed to carry out an unlawful purpose, even though speech is the medium by which such unlawful purpose is sought to be consummated. Nor is there anything in those cases which prevents the state from making reasonable regulations to protect the freedom and independence of employees to determine and express their views as to their choice of collective bargaining agencies, unhampered by any interference calculated to impair that independence. * * *"

This case on appeal to the Supreme Court of Wisconsin is reported in 238 Wis. 379, 299 N. W. 31 (1941).

If the legislature has the power to protect a worker in his right to organize and bargain collectively through representatives *of his own choosing* without intimidation or coercion from any source, if the legislature has the right to protect the freedom and independence of employees to determine and express their views as to their choice of collctive bargaining agencies, unhampered by any interference calculated to impair that independence, if the legislature has the right to say to the employer; you shall not coerce your employees, the legislature must have the *power* to protect both employees and employers, must have the

power to protect the employees from coercion or against concert of action directed at the infliction of intentional injury upon them as a result of their having exercised their choice, and must have the power to protect the employer from concert of action directed at the infliction of intentional injury upon him as the result of his having met the standard of fairness which the legislature said he must meet, namely, refrain from coercive conduct.

For cases giving the widest conceivable latitude to the constitutional concept of freedom of speech but recognizing that this constitutional right cannot be pressed to a point where the legislature is left completely impotent to deal with the problem of concert of action directed at injury of another, see *Schwab v. Moving Pictures Machine Operators, Local 159 et al*, —Ore.—, 109 P. (2) 600 (Jan. 28, 1941). To the same effect see *Eastwood-Neally Corp. v. International Assoc. of Machinists*, 124 N. J. Equity, 274, 1 Atl. (2) 477. See also *McKay v. Retail Automobile Salesman Local Union 1067*, — Cal. —, 106 P. (2) 373 (1941); and *Smith Metropolitan Market Co. v. Lyons et al*,— Cal. —, 106 P. (2) 414, (1941).

In both the Oregon and New Jersey cases, supra, it was held that picketing directed to the accomplishment of an unlawful purpose is not entitled to constitutional protection as an exercise of freedom of speech.

E. Because of the construction placed upon the challenged section by the Supreme Court of Wisconsin there is no occasion for this Court to appraise the substantiality of the need for it* but even if there is such occasion, it is manifest that there was and is a substantial need because of (1) the power given to labor under prior state legislation, (2) the abuse of this power by labor, (3) the bitter struggle then and now being waged within the ranks of organized labor, —the AFL—CIO conflict, (4) problems which arose out of new acts beneficial to organized labor such as the National Labor Relations Act and the State counterpart thereof, and (5) facts known to all with respect to the functioning of organized labor including peaceful picketing used as an instrument to perfect and maintain a boycott.

The petitioners' brief (p. 22) characterizes the act as a whole as one seeking to impose upon the workers of the state an involuntary condition of servitude and as one which seeks to deny to them constitutional rights. The legislature, the administrative body (the board) and the Courts of the State are all accused of joining in seeking to bring about such condition.**

It is further stated by petitioners: (p. 21 of their brief)

"The enactment of chapter 111 constitutes a deliberate attempt on the part of the Wisconsin Legislature to circumvent the holdings of this Court in the

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*The section regulates in area (2) and not in area (3). See p. 53 of this brief.

**Such argument by way of accusation, coming from one who has always been recognized as one of organized labor's most vocal exponents in the State is at least some indication that the legislature was not entirely superslitious when it concluded that the time had come to enact legislation calculated to balance the rights of all major interests involved in industrial controversy.

cases of *Senn v. Tile Layers' Protective Union*, 301 U. S. 468; *Lauf v. Shinners*, 303 U. S. 323, and *New Negro Alliance v. Sanitary Grocery Company, Inc.* 303 U. S. 552. * * *"

It is not readily perceivable wherein the enactment of a new law by the legislature of a State presents any question of circumvention of the holdings of this Court in cases decided by this Court under a different State law. So much for the first two cited cases. Further, this Court did not determine the substantive rights of labor under the Wisconsin law involved in those cases. That was determined by the Supreme Court of the State of Wisconsin. This Court merely passed upon constitutional issues raised with respect to the law thus interpreted. The last cited case involves jurisdiction of the Federal Courts under the Norris-LaGuardia Act. We are not aware that the Norris-LaGuardia Act destroyed the police power of the state or that this Court has ever so held.

The mere characterizing of the Employment Peace Act as one designed to impose an involuntary condition of servitude upon labor and as one designed to defeat rights secured by the 14th amendment to the Constitution of the United States and the unwarranted assertion that the legislature, the administrative body and the courts of the State are all seeking to bring about that result, hardly establishes any point. The legislation is not designed to accomplish any such purpose. The legislation represents a sincere legislative effort to carefully balance the rights of all three major interests in industrial conflicts, namely the employee, the employer and the public.*

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*The scope, purpose and provisions of the act are analyzed on pp. 96-109 of this brief.

I. Background of the Employment Peace Act.

As set forth in petitioners' brief on pp. 18-19, the legislature of the state of Wisconsin, in several well known legislative enactments, was in the vanguard in enacting legislation favorable to labor. The legislature enacted as substantive law the provisions of the Federal Clayton Act. *A. J. Monday Co. v. Automobile A. & V. Workers*, 171 Wis. 532, 177 N. W. 867 (1920). The Norris-LaGuardia Act is but the federal equivalent of what became known as our state labor code. *American Furn. Co. v. I. B. of T. C. & H. of A.*, 222 Wis. 338, 268 N. W. 250 (1936). These acts were directed at equalizing the bargaining power of labor with that of employers. These acts were held to confer substantive rights upon labor. *Trustees of Wis. S. F. of Labor v. Simplex S. M. Co.*, 215 Wis. 623, 256 N. W. 56 (1934), *American Furn. Co. v. I. B. of T. C. & H. of A.*, 222 Wis. 338, 268 N. W. 250 (1936), *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, 82 L. ed. 872 (1938), *Senn. v. Tile Layers Protective Union*, 301 U. S. 468, 81 L. ed. 1229 (1937).

In 1937 the legislature adopted what was commonly known as the "Little Wagner Act". *Wisconsin Labor Relations Board v. Fred Rueping L. Co.*, 228 Wis. 473, 279 N. W. 673 (1938).

When the legislature met in 1939 and enacted the Employment Peace Act, it was not enacting legislation wholly divorced from experience. It was enacting legislation in the light of experience and in the light of problems which arose out of such experience under laws which were extremely favorable to labor.

2. Problems that arose under the old code.

The power that had been given to labor unions under the code presented very real and substantial problems. There was and is nothing fanciful about them. Refer to the Senn case. Senn was a small contractor in the tile-setting business in Milwaukee. It was a small concern and he employed only a very few men in his business. In addition to hiring tile setters, he performed services usually rendered by a journeyman or helper in that business. The AF of L union involved set out to put him out of business. He offered to meet every demand that they made upon him. He offered to compel all of his employees to join the union and offered to join the union himself, but the rules and regulations of the union were such that he could not join even though there was no question about his qualifications. All of the forces of organized labor were directed at him to put him out of business,—to prevent him from maintaining his only means of livelihood.

The problem presented in the *Senn case* was whether the legislature could permit combination to injure another to the extent permitted in that case without impinging upon the employer's constitutional rights under the [redacted] 14th Amendment. We have no intention of criticising the result of the *Senn case* in either the State Courts or this Court. It was decided that no constitutional right of the employer was violated by permitting such combination to injure and that whether it was wise or unwise to permit such combination under such circumstances was a matter of public policy of the state for the legislature to determine.

Many able lawyers and judges felt that property rights of an employer protected by the [redacted] 14th Amendment

to the Constitution of the United States were impinged when the legislature permitted concert of action to injure one to the extent permitted in the *Senn case*. See the vigorous dissent of Justice Fowler in *Senn v. Tile Layers Protective Union*, 222 Wis. 383, 268 N. W. 270 (1936) and of Justice Butler in said case in this Court, 301 U. S. 468, 81 L. ed. 1229 (1937). The same applies to circumstances such as were disclosed in *Lauf v. E. G. Shipner & Co.*, 303 U. S. 323, 82 L. ed. 872 (1938). See the dissent in that case.

It is certainly arguable from an examination of the facts disclosed in the *Senn case* than our then code had gone too far and had more thn equalized the bargaining power of labor. To some at least, it would appear that the then state labor code permitted organized labor to bring all of its destructive forces to bear against an individual who had done no wrong, who was not unsympathetic to labor, who was willing to have all of his employees join the union and who was willing to join the union himself except that the union would not let him. To some at least, the legalizing of concert of action aimed at such spoilation and destruction seemed at variance with some of the most cherished concepts of American life. The legislature made such combination lawful. It had the right to make such combination unlawful.

The *Senn case* illustrates the power which the legislature had conferred upon labor unions and the manner in which that power was being exercised. There was no possible alternative or manner in which Senn could meet the forces of organized labor. His situation was as pathetic as that of an individual employee endeavoring to bargain alone with the forces of organized capital. It seems to us

that it could be only a matter of time before the legislature would legislate to restore primary rights of persons so circumstanced as Senn to earn a living free from combinations aimed at destroying his only means of livelihood.

It hardly meets Senn's predicament to say that organized labor did not intend to injure Senn and that the injury caused to him was incidental to organized labors intention to benefit its own members. The primary objective of most unlawful conduct is that of helping oneself at the expense of others. That purpose does not make the conduct lawful as a matter of constitutional right. The legislature may make the objective unlawful. The legislature had made the unions' objective, with respect to Senn, lawful. It had the right to make that objective unlawful and did so.

Wisconsin's Labor Code did give tremendous power to labor unions. Unions had the power to make unionization an end in and of itself without regard to whether such unionization in a particular plant or a particular controversy was or was not benefiting the mass of labor involved in the drive for unionization and with total disregard to the harm inflicted upon industry.

The all-union agreement of organized labor became a fetish. Much of the industrial strife was based upon that issue and that issue alone. In many of the controversies there was not a single wage, hour or working condition issue involved. The instant case is illustrative. The all-union agreement was a legitimate object of organized labor, even though the union seeking such object did not represent a single employee of the employer. There was a silent voice in these controversies and that was the voice of the affected employee himself. Organized labor was permitted to use

all of the coercive instrumentalities at its command to coerce an employer to make his employees join the union. The employees themselves had nothing to say about the matter. If the employer yielded to the union's demand the workers either joined or lost their jobs. This was the law of Wisconsin throughout some of the worst depression years that this country ever experienced. To say that the employees had any *free choice* under such circumstances is a plain ignoring of the realities of economic facts. When an employer yielded to this pressure (always injurious and many times ruinous) the employees were forced either to join the union or accept public relief. The employee himself was subjected to a condition of servitude to organized dominance insofar as any free choice with respect to collective bargaining was concerned.

No one has ever been able to reconcile the concept that workers should have full freedom of association, self-organization and designation of representatives of their *own choosing* for purposes of collective bargaining with the all-union agreement. The Wisconsin Supreme Court gave serious consideration to the subject in *American Furniture Co. v. I. B. of T. C. & H. of A.*, etc., 222 Wis. 338, 268 N. W. 250 (1936) but was unable to reconcile the two concepts. The court said:

> "We are faced with the seeming contradiction that while the act contains no expressed intention to outlaw closed-shop agreements, it is expressly provided that activities of employees in the direction of association and organization for bargaining purposes shall not be subject to coercion or interference by employers. * * *
>
> "The question is not easy of solution. Defendants contend that the purpose of the act is merely to prevent

dominance by an employer of the organization of his employees and that, so long as he exacts as a condition of continued employment membership in an outside union over which he has no control, the purposes of the act are promoted rather than defeated. While much may be said for this view, *it is extremely difficult to reconcile with the full freedom of association and designation of representatives which the act expressly secures to the men.* It may well be that if, when negotiations for a closed shop are initiated between an outside labor union and an employer, *the employees have already exercised, free from their employer's domination, or are in the process of so exercising their right to organize and to select representatives for collective bargaining,* the employer may not insist that another or different plan of organization be adopted or that other representatives be chosen. *If he may not, then no pressure may be brought to bear upon him by an outside union to compel such action.* Whether pressure of the sort authorized by the act may be brought upon the employees by the outside union, *it is unnecessary to determine,* although in this connection it may be significant that neither the Wisconsin Labor Code nor the Norris-LaGuardia act *contain any provisions expressly inhibiting labor organizations from exercising the coercion and domination prohibited to employers.* See 47 Harvard Law Rev. 117; 21 Cornell Law Quarterly Rev. 640.

"We do not find it necessary finally to determine the difficult questions above set forth. Assuming that defendants' contentions with respect to them be rejected and the rule most favorable to plaintiff established, the result in this case would not be affected."

The two concepts are irreconcilable. Such an agreement being a lawful objective of organized labor, regardless of whether the involved union represented a majority of employees of an employer in a collective bargaining unit, or represented any employees of the employer, plus the economic conditions of the times, resulted in a large measure in defeating the exercise by workers of *full freedom* of association, self-organization and designation of representatives of their own choosing for purposes of collective bargaining.

If one inclines to the view that power of such nature as that conferred by the Wisconsin State Labor Code invites abuse (history demonstrates that unchecked power is always abused) and will ultimately prove detrimental to the public as well as to a substantial element of labor itself, it may be seriously questioned whether the existing laws were consonant with the public interest or the interests of labor itself.

It was not even suggested in the *Senn case* in this Court that the legislature lacked competency to deal with problems arising under the code. This Court, by Justice Brandeis, said:

> "* * * The laws of Wisconsin, as declared by its highest court, permit unions to endeavor to induce an employer, when unionizing his shop, to agree to refrain from working in his business with his own hands—so to endeavor although none of his employees is a member of a union. Whether it was wise for the State to permit the unions to do so is a question of its public policy—not our concern. The Fourteenth Amendment does not prohibit it." (*Senn v. Tile Layers Protective Union*, 301 U. S. 468, 81 L. ed. 1229, 1237-1238 (1937))

In the short space of a few years, upon the basis of contentions made in the petitioners' brief, the problem seems to have become not one of whether the legislature has power to permit such combination to do injury to another without impinging upon constitutional rights of that other but whether the legislature has the power to prohibit under any circumstances such combined action directed at the injury of another. The claim is asserted under the banner of freedom of speech. Reduced to its essentials, the claim asserted by petitioners is that of a constitutional right under the disguise of free speech to combine to do injury to another under *any and all circumstances.*

3. New acts promotive of labor's interests, such as the National Labor Relations Act, and factional wars within the ranks of labor gave rise to additional real problems.

When the legislature met in 1939 and passed the Employment Peace Act, it was, of course, cognizant of the war that has been waged in the ranks of labor, that is, the bitter struggle that had gone on for a number of years between AF of L and CIO, the two strongest national labor organizations. The conflict had been carried to such extremes that the President of the United States had asked the warring unions to settle their differences in the interests of the public as well as in the interests of labor itself. Neither union had to that date manifested any interest in adjusting those differences—nor have they even to this date. It is perfectly conceivable that the underlying philosophies of the two unions are such that their differences are irreconcilable and that both unions sincerely believe that the cause of labor

can only ultimately be served by one of the two warring unions gaining supremacy.

But such bitter union wars are not promotive of public welfare, oftentimes are not promotive of the labor element involved in a particular controversy and further, oftentimes the employer is caught between the millstones of these warring factions within the ranks of labor. It certainly is not promotive of the public interest to permit such factional wars to such an extent that the employer, the public and labor itself are the victims of warring philosophies of unionism within the ranks of labor.

The situation of the employer caught between the millstones of these warring unions is well illustrated in *Union Premier Food Stores v. Retail Food C. & M. Union, etc.*, 98 F. (2) 821 (1938)* and in *Fur Workers Union, Local No. 72 v. Fur Workers Union*, 105 F. (2) 1 (1939).** Other cases where the employer was helpless when caught between the millstones of these two warring unions in the ranks of labor are cited in the Circuit Courts of Appeal decisions in these two cases.

In an article in the National Lawyers Guild for January, 1940, Volume 2, No. 4, Mr. Padway, general counsel for the AF of L, urged that under the National Labor Relations Act and the Norris-LaGuardia Act, the Federal Courts are without power under the latter act to enjoin picketing by a minority union in those instances where there has been a representation dispute, the problem submitted to the National Board and the board has certified

*Certiorari was granted by this Court and the case subsequently dismissed.—60 S. Ct. 376.

**Certiorari was likewise granted by this Court, and the judgment of the Circuit Court of Appeals affirmed—84 L. ed. 247.

a particular union as the representative of all of the employees for purposes of collective bargaining. Under such circumstances, it would be an unfair labor practice for the employer to bargain collectively with any other union than that certified by the board. *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515, 81 L. ed. 789 (1937); *National L. R. Bd. v. Jones & Laughlin S. Corp.*, 301 U. S. 1, 81 L. ed. 893, 108 A. L. R. 1352 (1937).

It seems that a similar problem existed under the Wisconsin Labor Code and the State Labor Relations Act prior to its abolishment and the enactment of the Employment Peace Act, Ch. 57, Laws of 1939 (May 4, 1939).

Regardless of the merits of such contention (it would seem that a strong case can be made for such contention) the injustice of laws which permit combinations to direct their injurious activities at injury of another under such circumstances seems apparent. The employer so circumstanced has done everything that he can to meet union demands. He has finally been placed in the position where he can bargain only with one union and if he bargains with any other union he commits an unfair labor practice. Nevertheless, it was and is asserted that an employer so circumstanced may be subjected to organized concert of action to do him harm, the same as if he were in fact an employer hostile to labor.

Laws which permit any such concert of action under such circumstances obviously show no great concern for the balancing of protectable rights. In the same article Mr. Padway observed as follows:

> "Without the right of minority unions to picket, the following situations become more probable. Let us

assume that the Board has certified an industrial union as the exclusive bargaining agent for a plantwide unit. Let us further assume that the numerically small skilled groups within the plant have, through their opposition to the industrial union, antagonized the leaders of the industrial union. The majority union can in retaliation negotiate a contract that completely ignores the rights of the skilled workers — decrease their wages, increase their hours, and generally remove gains made in conditions of work.

"These groups, victimized by the vindictive attitude of an unsympathetic union, with the help of the employer who stands to gain thereby, would be denied the right to publicize their plight. * * *" National Lawyers Guild Quarterly, Vol. 2, No. 4, Jan. 1940, p. 232.

The court will recognize the counterpart of this argument on pp. 30, 33, 76 and elsewhere in petitioners' brief, except that the argument therein made is placed upon the basis of a constitutional right under the 14th amendment to carry on this bitter union struggle at the expense of employers, employees, workers and the public and regardless of the affect upon these major interests.

If the two largest labor unions in the country cannot trust each other to act in the interests of labor, it does not seem particularly amazing that the legislature in 1939 took cognizance of some of the inequalities under existing laws and decided to place some restriction upon the right to use concert of action to do injury to another.

Under the National Labor Relations Act Title 29, U. S. C. A., Section 158 (3) and Section 159 (a) employer use of an all-union agreement is an unfair labor practice unless

the union in question represents a majority of employees in a collective bargaining unit. The all-union agreement is recognized for what it is; a coercive instrumentality, and its use is regulated.

As the employer is prohibited from coercing with respect to this subject matter, the decision of this Court in *International Association of Machinists, etc. v. National Labor Relations Board*, 311 U. S. 72, 85 L. ed. 5 (1940) was one which anyone might reasonably anticipate. In that case this Court sustained the Labor Board in ordering an employer to cease recognizing an AF of L union that had an all-union agreement with the employer where it did not appear that the union represented an *uncoerced* majority of the employees in an appropriate bargaining unit.

Under the law of Wisconsin prior to the passage of the Employment Peace Act, as already pointed out, an all-union agreement was a legitimate object of a labor union even though it did not represent a majority of the employees in an appropriate collective bargaining unit and even though it did not represent any employees in a collective bargaining unit. This was true even after the passage of the state's Little Wagner Act. *United Shoe Workers, etc. v. Wisconsin Labor Relations Board.*, 227 Wis. 569, 279, N. W. 37 (1938)— It would seem that any legislature at all alive to this situation and having any regard for the balancing of protectable rights might reasonably conclude that employers ought to be protected from concert of action directed at injury to them where the objective sought was one which an employer subject to the jurisdiction of the National Board could not yield to without committing an unfair labor practice.

In *Valley Mould and Iron Corp. v. National Labor Relations Board*, 116 Fed. (2) 760 (Dec. 17, 1940) the Court said:

> "The act was intended to secure and preserve for employees the right to bargain collectively without intimidation, coercion or other improper influence from anybody, *whether it be employer, labor unions or others*. The purpose of the legislation and its proper administration necessitate, upon the part of the employer, the utmost of honest neutrality upon his part. It imposes upon him the duty to realize that his employees are free agents and that he must stand as a neutral party, accepting without reservation their selection of bargaining agent. This neutrality is akin to that of the examiner, the Board and the court. It is not for the Board or the courts to take into their hands the decision of which is the best union for the employees. The whole purpose is to impose upon the employer, the Board and the court, utter neutrality and impartiality. The whole end in view is free, untrammeled, uninfluenced self-determination of a bargaining agent. * * *"

It would seem apparent that as a matter of plain realism there can be no such absolute neutrality on the part of an employer if the laws are such that unions may use all weapons which they customarily use in forcing demands directed at compelling an employer to violate this neutrality. The petitioners claim the right to conduct all such activities in the name of freedom of speech under the 14th amendment.* The argument impresses us as ridiculous,

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*Throughout their brief petitioners attempt to place boycotting upon the same basis as picketing under the 14th amendment. See petitioners' brief pp. 25, 26, 32, 41, 52 and 70.

but if the petitioners do have any such constitutional right, then it would seem that all acts passed in the interests of labor and directed at compelling an employer to take this neutral attitude must fall as violative of the employer's rights under the 5th and 14th amendments.

In *South Atlantic Steamship Company of Delaware v. National Labor Relations Board*, 116 Fed. (2) 480 (Jan. 3, 1941) the employer had a so-called preferential closed-shop agreement with an AF of L union. Some twenty-three members of this union joined a CIO organization. The AF of L union threatened strike unless these twenty-three were discharged and AF of L members employed. The employer was a maritime shipper and the strike would tie up all the employer's ships. There was some evidence that under actual operation the parties had treated the preferential agreement as the equivalent of an all-union agreement. The employer yielded to the demands of the AF of L union. He was adjudged guilty of an unfair labor practice because of these discharges (interferences) without an all-union agreement. See also:

National Labor Relations Board v. Ed Friedrich, Inc., (1941) 116 Fed. (2) 888.

In re Mooremack Gulf Lines, Inc. etc. (Dec. 1940) reported 7 L.R.R., 463, the National Board extended the protection of the Act to strike breakers whom the employer wished to retain but who were discharged by the employer upon demand of the striking union upon reinstatement of striking employees. This was held to be interference. The National Union threatened a sit-down strike unless these employees were discharged. The Board reasoned as follows:

"[Text] 'The existence of the N.M.U.'s pressure upon the respondents to effect the discharge of the complainants with the threat of a series of sit-down strikes is established beyond question. However, the record is equally clear that the complainants were discharged by the respondents because of their membership in the C.T.U. and their refusal to join the A.C.A. when the respondents capitulated to that pressure. As we have heretofore stated, the Act, which is paramount, prohibits such discrimination for union activity without exception predicated upon circumstances or conditions which here induced the discrimination. To hold otherwise would virtually nullify the Act in any situation where rival labor organizations were involved. "It would mean that an employer would be relieved of all obligation under the Act merely upon a showing of pressure and consequent probable loss from one of the rival organizations. The result would be that the rights supposedly guaranteed by the Act, whether of a majority or a minority group, would be at the mercy of an employer and of rival groups in any case where the rival group chose to exert pressure and the employer chose to take advantage of it.' "

The board might well have added,—if the injury of the business threatened was such that the employer yielded rather than suffer same.

The National Board's jurisdiction is limited to that of acting upon the employer when he acts so as to defeat the rights protected under the Act. As a consequence, labor groups may with impunity make demands upon the employer which he may not yield to under the National Act and said groups can and do threaten to bring all of the destructive forces of their combination against an employer

unless he yields to the outlawed demand (outlawed used in the sense that the employer may not yield to it without committing an unfair labor practice under the act.) If the employer purchases peace at the price of yielding to the outlawed demand, he commits an unfair labor practice under the act and the board has the authority to and does order the employer to cease and desist from the unfair labor practice and applies the remedial provisions of the Act. The same situation existed under Wisconsin law prior to the passage of the Employment Peace Act.

Such being the scope of the power of the National Board and the scope and power of the State Board under the Little Wagner Act, it does not seem too surprising that the State has legislated outlawing the demand of the union which the employer may not meet and which, if yielded to, results in the employer committing an unfair labor practice as well as the conduct of the employer which results in defeating the rights sought to be protected by both Acts. The Employment Peace Act makes it an unfair labor practice for a union to make a demand which an employer may not meet and to engage in activities directed to that end as well as making it an unfair labor practice on the part of the employer if he yields to a demand which he may not yield to.

Under all of the situations herein discussed (the situations are illustrative rather than intended as exhaustive) petitioners' argument goes to the length of asserting that freedom of speech under the 14th amendment is an effective barrier against legislative competency to meet or deal with such matters. It is urged that combinations may bring all of their destructive forces to bear against an employer

even though he is helpless to meet the demand and cannot meet it under existing laws.

Is it not perfectly apparent where such concept takes us? It means that the legislature is impotent to deal with the problem of justification for concert of action directed at injury to another and with the combination left free to make its own determination of justification. Freedom of speech meant to preserve democracy becomes the concept by which all other freedoms are destroyed.

4. Facts known to all with respect to the functioning of organized labor.

This Court will take judicial notice of the increasing public awareness of racketeering and of no inconsiderable communistic domination within the organized labor movement. See also R. I, 225, 227, 228, R. II 35. These were matters of legitimate legislative concern.

Unchecked power breeds arrogance, breeds an unyielding attitude not conducive to collective bargaining. This case itself illustrates the point* Unchecked power breeds a "rule or ruin" policy. Again the record in the instant case is illustrative. The unions had contractual relations with the company. They obtained from the arbitration board everything they asked for by way of improved wages, hours and working conditions (the company had not opposed such requests) except an all-union agreement without submitting that issue to the affected employees. The parties

*We set forth a very detailed statement of the facts of this case including the negotiations preceding and the arbitration proceeding. The case is an illustrative object lesson of what unchecked power breeds.

were bound by the arbitration award. The company accepted it. The unions did not. They severed contractual relations and since the inception of the strike have been directing all of their destructive forces against the company to compel it to violate Wisconsin law. The rule or ruin policy which is bred by unchecked power is illustrated in the *Golden Guernsey case (Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers and Dairy Employees' Union, etc.*, 238 Wis. 379 (1941)). The attitude and arrogance which unchecked power breeds is further illustrated by *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, 82 L. ed. 872 (1938). See statement of facts in the dissenting opinion. Nor did the legislature need to close its eyes to the known facts as to what picketing means in a modern industrial controversy as distinct from advertising the facts of a labor dispute without annoyance or threat of any kind, to the end that there may be free competition of ideas in the open market of public opinion and without which information democracy cannot successfully function (*Thornhill v. State of Ala.* 310 U. S. 88, 84 L. ed. 659 (1940)); as distinct from an appeal to reason by all peaceful means of gaining access to the mind (*Milk Wagon Drivers' Union v. Meadowmoor Dairies*, 312 U. S. 287, 85 L. ed. 497 (Feb. 1941)),—picketing entitled to protection as freedom of speech under the 14th amendment.

Actually and factually, picketing as used in an industrial controversy, far exceeds any such allowable area. It is used as an instrument of perfecting and maintaining a boycott and so enmeshed therewith as to be incapable of separation therefrom. Unions are organized into locals, the locals are affiliated with the State organization and with

central bodies which hold themselves out as being able to secure for any affiliate the cooperation and united action of all affiliated unions and their members, prompt and concerted action of all affiliated unions and their members and the entire numerical strength of the AF of L affiliated unions in the support of and in the attainment of the approved demands and objectives of a contending union or unions.*

A fundamental tenet of AF of L unionism and one of the cornerstones upon which such unionism is based is that of honoring an AF of L picket or pickets. This fundamental concept and rule is usually expressed in terms of "not going through a picket line". One AF of L picket in front of a place of business or establishment is a picket line within the rule and recognized as such by all AF of L union members. This rule creates an arbitrary dead line along the picket's path beyond which no AF of L member dare pass regardless of whatever craft, trade, industry or profession the member may be in and regardless of whether said member of the AF of L union of which he is a member has any dispute with the picketed place of business or employment and regardless of whether said member's employer has any dispute with the picketed place of business or employment. Any AF of L member, regardless of whether said member or the AF of L union, of which he is a member, has any dispute with the picketed place of business or employment and

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*The petitioners in their petition for certiorari supplied this court with an appendix to the reply brief in which is set forth the findings of fact and conclusions of law of the Circuit Court for Milwaukee county in a subsequent contempt action brought to enforce the order of the board in the instant case. The assertions made upon this branch of the argument are not mere assertions. They are facts and they are supported by the trial court's findings of fact in the contempt proceeding. The petitioners in their brief apparently deem it expedient to ignore what picketing actually and factually involves. See finding 7, p. 7; finding 8, p. 9 of petitioners' appendix to reply brief in support of petition for writ of certiorari.

regardless of whether said member's employer has any dispute with the picketed place of business, who disregards this rule of trade unionism and enters the place of business by "crossing the picket line" to himself perform any service for the picketed place of business or to patronize the said place of business or to have any contacts therewith or to perform any service for his employer by way of delivery of goods, wares, merchandise, material, equipment, supplies or the rendition of services, knows that he violates said rule and commits an act of disloyalty to his union, and that he subjects himself, or runs the risk of subjecting himself, to fine, suspension or other disciplinary action by the union of which he is a member. Such disciplinary action may be severe. The rule of not going through the picket line is not a voluntary or optional matter with AF of L members nor is the enforcement of the rule by way of disciplinary action against offenders entirely optional with the various locals affiliated with the Wisconsin State Federation of Labor and the Federated Trades Council of Milwaukee. There is at least a tacit understanding among all locals affiliated with the Federated Trades Council that the rule will be enforced as to all approved strikes.*

Picketing as used by AF of L unions means compulsory "hands off from this place of business" to all members of the organization. It means organized concert of action directed at doing injury to another. It means organized boycott at the sales end of a business. It means concerted effort to prevent or interfere with the receipt of raw materials, products, merchandise or services. That is what one picket

*Finding 18, pp. 16, 17, petitioners' appendix to reply brief in support for petition for writ of certiorari.

(ostensibly advertising the facts of a labor dispute) means actually and factually.

The foregoing is organization for power. It is in no sense an exercise of the constitutional right of freedom of speech. And yet the petitioners herein urge that the legislature is without any power to regulate or curb in any manner the exercise of such power under any circumstances. There obviously can be coercive picketing although it is peaceful in the sense of freedom from physical violence. Picketing, as used by AF of L organizations is never non-coercive. It is the instrument by which a complete boycott is perfected and maintained.

F. Because of the construction placed upon the challenged section by the Supreme Court of Wisconsin, there is no occasion for this Court to consider the Act as a whole for the purpose of examining the extent to which the Act manifests regard for the balancing of rights of all major interests* but even if there is such occasion, it is apparent from an analysis of the Act that it does show a scrupulous legislative regard for the balancing of rights of all major interests.

If the challenged section does involve any constitutional question of reasonable regulation of exercise of the right of free speech (we assert that it does not as it does not regulate within that area), then this Court would have to examine the Act as a whole to determine whether it does manifest care in balancing rights of all major interests for the purpose of determining whether in the light

*The section regulates in area (2) and not in area (3). See p. 53 of this brief.

of all protective provisions the challenged section is a reasonable regulation.

The right of freedom of speech is not an absolute right and is clearly subject to regulation.

Near v. Minn. ex rel Olson, 283 U. S. 697, 75 L. ed. 1357 (1931);

Schenck v. United States, 249 U. S. 47, 39 S. Ct. 247, 63 L. ed. 470 (1919);

Gitlow v. New York, 268 U. S. 652, 45 S. Ct. 625; 69 L. ed. 1138 (1925);

Wisconsin Employment Relations Board v. Fred Rueping L. Co., 228 Wis. 473, 279 N. W. 673 (1938);

Regulation of the right of freedom of speech may be sustained in an act which does manifest care for the balancing of major interests where such regulation could not be sustained in an act which does not manifest such care. This Court specifically recognized such to be true in the *Thornhill case*, when it said:

> "Sec. 344B in question here does not aim specifically at serious encroachments on these interests and does not evidence any such care in balancing these rights against the interest of the community and that of the individual in freedom of discussion on matters of public concern."

There can never be a balancing of protectable rights or any regulation of constitutional rights without circumscribing in some degree the absolute exercise of the right

regulated. *Minersville School District et al v. Gobitis*, 310 U. S. 586, 60 S. Ct. 1010, 84 L. ed. 1375.

We cannot see wherein the challenged section, in the light of the State Supreme Court's interpretation of it, even attempts to regulate conduct which falls within the area of exercise of the constitutional right of freedom of speech. If the challenged section, as construed, touches even incidentally the area of exercise of the right of freedom of speech, it would seem that any conceivable regulation involved in that area is of insignificant import when compared to the regulation sustained by this Court in the field of freedom of religious worship in the *Gobitis case*. The Gobitis children were obliged to surrender their religious principles or forfeit the right to attend the public schools. The decision is grounded upon the basis of a great constitutional concept coming in conflict with the great concept of national unity (peace time national unity). There obviously was a clash between two great concepts. If there is a conceivable clash in the case at bar it must be a clash between the power of the State to control violent, intimidating or coercive means as opposed to freedom of speech absorbing such power.

1. Analysis of the scope, purposes and provisions of the Employment Peace Act.

It is apparent from an examination of the act that it is designed to meet many of the problems which arose under prior State laws as well as problems which arose out of the Congress enacting the National Labor Relations Act. Some of these problems have been adverted to and discussed, pp. 74-93 of this brief. The problems were real and substantial.

The Act is narrowly drawn and permits both the board and the courts (like the National Labor Relations Act) to deal with each individual case upon the factual situation presented by that case. The act is a sincere legislative effort to balance the rights of all major interests in industrial strife.

The purpose of the act is set forth in the declaration of policy, sec. 111.01 of the Act. Sec. 111.01 (1) recognizes that there are three major interests involved in employment relations, namely: the public, the employee and the employer, all of which interests are interrelated. The purpose and policy of the state is to protect and promote each of these interests with due regard to the situation and the rights of the others.

The Act, by sec. 111.01 (2) recognizes that industrial peace, regular and adequate income for the employee and uninterrupted production of goods and services are promotive of all of these interests and that they are largely dependent upon the maintenance of fair, friendly and mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever controversies may arise.

The Act recognizes by sec. 111.01 (3) that negotiations of terms and conditions of work should result from voluntary agreement by the employer and employees; for purposes of such negotiations an employee has the right, "if he desires, to associate with others in organizing and bargaining collectively through representatives of his own choosing, without intimidation or coercion from any source."

Sec. 111.01 (4), in its declaration of policy provides:

> "(4) It is the policy of the state, in order to preserve and promote the interests of the public, the employe, and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated.
>
> "While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat."

The Act, by sec. 111.02, sets up comprehensive definitions for the purposes of administering the Act.

Subsec. (1) of this section defines the term "person", subsec. (2) defines the term "employer", subsec. (3) defines the term "employee", subsec. (4) defines the term "representative", subsec. (5) defines the term "collective bargaining". Subsec. (5) reads:

> " 'Collective bargaining' is the negotiating by an employer and a majority of his employes in a collective bargaining unit (or their representatives) concerning representation or terms and conditions of employment of such employes in a mutually genuine effort to reach

an agreement with reference to the subject under negotiation."

Subsec. (6) defines the term "collective bargaining unit". This subsec. reads:

> "The term 'collective bargaining unit' shall mean all of the employes of one employer (employed within the state), except that where a majority of such employes engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in section 111.05 (2) to constitute such group a separate bargaining unit they shall be so considered. Two or more collective bargaining units may bargain collectively through the same representative where a majority of the employes in each separate unit shall have voted by secret ballot as provided in section 111.05 (2) so to do."

It will be noted that these collective bargaining units are made very elastic and that the affected employees themselves determine bargaining units. The fears which Mr. Padway expressed in the article in the National Lawyers Guild (see p. 83 of this brief) and the same fear expressed in petitioners' brief in this Court, pp. 30, 33-76) is of minor consequence under the Wisconsin Act. Every opportunity is given to the employees themselves to form, join and demand recognition as craft units. The act is much more carefully drawn to protect the right of minorities in selecting their own units and to protect minority collective bargaining than is the National Act. See *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401, 60 S. Ct. 300, 84 L. ed. 347 (1940). The declared policy of the National Act (sec. 1) among other things

is that of "protecting the exercise by workers of full freedom of association, self-organization and designation of representatives *of their own choosing* for purposes of collective bargaining." It might be a trifle difficult to convince the AF of L members involved in the cited case that the act does protect such right. The Wisconsin Act is designed to make the concept real.

Continuing with the definitions found in the Act, subsec. (7) defines the term "unfair labor practice" to mean any unfair labor practice defined in sec. 111.06.

Subsec. (8) defines the term "labor dispute" as follows:

> "The term 'labor dispute' means any controversy between an employer and the majority of his employes in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute."

Subsec. (9) defines the term "all union agreement." The definition is the accepted meaning of said term.

Subsec. (10) defines the term "board" to mean the board is created by sec. 111.03.

Subsec. (11) defines the term "election" and subsec. (12) defines the term "secondary boycott".

Sec. 111.03 creates the administrative board.

Sec. 111.04 provides:

> "Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful con-

certed activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities."*

Sec. 111.05 provides for representatives and elections. Subsec. (1) provides:

"Representatives chosen for the purposes of collective bargaining by a majority of the employes voting in a collective bargaining unit shall be the exclusive representatives of all of the employes in such unit for the purposes of collective bargaining, provided that any individual employe or any minority group of employes in any collective bargaining unit shall have the right at any time to present grievances to their employer in person or through representatives of their own choosing, and the employer shall confer with them in relation thereto."

Subsec. (2) provides for the board's holding elections to determine questions of collective bargaining units. The board is not given any power to select bargaining units for

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*This is the same policy set forth in the Norris-LaGuardia Act, U.S.C.A., Tit. 29, sec. 102 insofar as material, provides:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, **though he should be free to decline to associate with his fellows,** it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted." (Bold type ours)

employees. In this respect the Act differs from the National Act.

Subsec. (3) provides for secret ballot elections conducted by the board for employees in appropriate collective bargaining units to determine their collective bargaining representatives. Questions concerning certification of the results of elections are open to review in the courts in the same manner that the board's orders with respect to unfair labor practices are open to review. (See sec. 111.05 (3)).

Sec. 111.06 is the section with respect to unfair labor practices. Subsec. (1) sets up employer unfair labor practices. These provisions in the main follow the provisions of the National Act. There are added provisions not found in the National Act. For instance, subsec. (j) makes it an unfair labor practice for an employer

> "To employ any person to spy upon employees or their representatives respecting their exercise of any right created or approved by this chapter."

and subsec. (k) makes it an unfair labor practice for an employer

> "To make, circulate or cause to be circulated a blacklist as described in section 343.682."

Subsec. (1) (c) of sec. 111.06 provides that it shall be an unfair labor practice for an employer

> "To encourage or discourage membership in any labor organization * * * by discrimination in regard to hiring, tenure or other terms or conditions of employment; provided, that an employer shall not be prohibited from entering into an all-union agreement with

the representatives of his employees in a collective bargaining unit, where three-quarters or more of the employees in such collective bargaining unit shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board. * * *"

If a union having such an agreement unreasonably refuses to receive as a member any employee of such employer the board shall declare the agreement terminated.

Subsec. (e) makes it an unfair labor practice for an employer to enter into an all-union agreement except in the manner provided in subsec. (1) (c) above quoted. Aside from the secret referendum ballot features of this provision and aside from the provision requiring three quarters approval rather than majority approval, the provision is similar to the provisions of the National Act, which prohibits all-union agreements with a union unless the union represents a majority of employees in an appropriate collective bargaining unit. See pp. 83-84 of this brief.

These provisions with respect to the all-union agreement are the only provisions of the entire act which are not grounded upon the principle of majority rule in a collective bargaining unit. Majority rule in a collective bargaining unit is the very foundation and cornerstone upon which the structure of the principle of collective bargaining is erected. It is a principle without which there can be no collective bargaining.*

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*The petitioners assert (p. 35 of their brief) that the supreme court of **Oregon in American Federation of Labor v. Bain,** 106 P. (2) 544 overthrew a statute similar in structure to that of the Employment Peace Act and assert that the statute involved in the Oregon case was grounded upon majority vote in appropriate collective bargaining units. The Oregon statute overthrown in that case made no provision at all for appropriate collective bargaining units. That

Subsec. (2), (a) to (j) inclusive of sec. 111.06, sets up employee unfair labor practices. From an examination of these various subdivisions of the statutes it is apparent that what the legislature strove for in enacting these provisions was that of giving the board power to prevent workers from inflicting economic loss upon employers and employees when the object of the workers was that of compelling or coercing employers to violate the neutrality required of them with respect to collective bargaining both under the National Act and under the State law or where the object was that of *compelling* or *coercing* employees with respect to joining organizations not of their own choosing for purposes of collective bargaining.

Note that subsec. (3) of sec. 111.06 provides as follows:

> "It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employes, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section."

Beyond this and in the main, employee unfair labor practices which are outlawed by subsec. (2) are practices which are recognized as unlawful conduct in any civilized society. Subsec. (e) is the challenged section. Here again, the principle adopted by the legislature to determine whether the conditions which prevail in an employment are such as to warrant concerted coercive instrumentalities to be directed against the employer to his injury and con-

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fact alone would be sufficient to distinguish the Oregon statute overthrown from the Employment Peace Act. Further, the statute was construed to prohibit minorities from picketing even though the picketing was not violent, intimidating or coercive in character.

sequent injury to his employees is that of majority rule within an appropriate collective bargaining unit. This section is obviously aimed at democratic functioning of collective bargaining units and against autocratic and arbitrary control of such units by those in power in the labor movement and who incline toward the exercise of such autocratic control. Neither history nor current events would sustain any assertion that the legislature had nothing to fear in this direction. The section also aims to protect the industry of the State fro museless, needless and unjustifiable injury when the cause of the dispute is unsubstantial. No one can determine that question better than the employees themselves in an appropriate collective bargaining unit. They determine such question upon the basis of their own self interest.

Sec. 111.07 provides the procedure for presenting unfair labor practices to the board and confers sufficient power upon the board with respect to issuing subpoenaes, etc. to permit it to function effectively as an administrative agency. Subsec. (7) of said section provides for the enforcement of its order by the board where the order is not obeyed. The enforcement proceedings are in the Circuit Courts throughout the State. With respect to the power of the Circuit Court in the enforcement proceedings this section, among other things, provides:

> "* * * Upon such hearing the court may confirm, modify, or set aside the order of the board and enter an appropriate decree."

This subsection makes provision for the Circuit Court granting leave to adduce additional evidence where such evidence appears to be material and reasonable cause is

shown for failure to adduce such evidence in the hearing before the board. The taking of the additional evidence is before the board and the board may then modify its findings of fact or make new findings by reason of the adduction of additional evidence. The subsection further provides that the judgment and decree of the Circuit Court shall be subject to review by the Supreme Court.

Subsec. (8) of said section makes provision for any aggrieved party commencing an action for review in the circuit court of any order of the board. The proceedings upon such a review are the same as proceedings brought by the board to enforce its order under the preceding subsection.

Sec. 111.15, already adverted to, provides as follows:

> "Except as specifically provided in this chapter, nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything in this chapter be so construed as to invade unlawfully the right to freedom of speech. And nothing in this chapter shall be so construed or applied as to deprive any employe of any employment benefit which he might otherwise be entitled to receive under chapter 108 of the statutes."

Both the board and the courts are enjoined by the express language of this provision from applying any section of the Act so as to invade the constitutional right of freedom of speech. Both the board and the courts deal with conduct upon the basis of the factual situation presented in each particular case. Both the orders of the board and the decrees of the court are adjusted to the particular facts

of the particular case. Both the board and the courts "deal with controversies through the concreteness of individual litigation rather than through the abstraction of a general law." Milk Drivers' Union v. Meadowmoor Dairies, 312 U. S. 287, 85 L. ed. 497 (Feb., 1941).

Sec. 111.08 provides for collective bargaining agencies making financial reports to those whom they represent. Sec. 111.10 provides for arbitration and sec. 111.11 provides for mediation.

This is the act which petitioners characterize (petitioners' brief, p. 22) as "an employee slavery act" and with respect to which the legislature, the board and the Courts are charged with having sought to impose upon the workers of the State an involuntary condition of servitude and with seeking to deny to the workers of the state their constitutional rights.

A major difficulty with labor today is that it wants recognition of the right of collective bargaining and it wants agencies, state and national, to protect and foster that right. It has struggled for recognition of the collective bargaining process. It has obtained recognition and protection, both nationally and in the State of Wisconsin, with respect to that process. It has obtained agencies, both nationally and in the State of Wisconsin to foster and protect this right. It wants to obtain all of the benefits from the collective bargaining process. Having obtained this recognition, it now seeks to repudiate all responsibilities that are entailed with respect to the fostering and protecting of that right. It wishes to have the law such (it asserts that constitutionally it must be such) that short of actual violence or threats thereof it can direct all of the coercive and

destructive forces of its tremendous organization against an employer to compel him to meet demands which he cannot meet under the very acts set up to foster and protect the collective bargaining right. Labor, through its spokesman, is instantly resentful at any mild legislative effort to make it accept the responsibilities that go with national and state agencies that have been set up to foster and protect the collective bargaining process.

With respect to sec. 111.06 (2) (e) (the challenged section) the Wisconsin legislature has in substance said to labor: We recognize your right to organize and bargain collectively and we will protect you in that right free from any interference or domination on the part of the employer, which interference or domination we have condemned as employer unfair labor practices. Under such circumstances, there is no justification for lawlessness, no justification for concert of action directed at injury to another by use of coercive measures merely because you claim that the end sought is a justifiable union end. There are obvious situations where the harm that you do an employer and his employees by employing concerted coercive measures so outweighs any union justification as to demand that the employer be free from injury which he suffers from your concerted coercive activities directed at injuring him. Such a situation exists when there is no substantial labor dispute. You shall have freedom to publicize the facts with respect to any labor controversy and shall have full freedom to exercise all rights of freedom of speech guaranteed under the 14th amendment, but you may not concert and use coercive measures or coercive picketing, boycotting or other overt concomitants of a strike beyond freedom of speech

guaranteed by the constitution unless the majority of employees in a collective bargaining unit of an employer, against whom such acts are primarily directed, have voted by secret ballot in favor of a strike.

We are giving you every facility for organizing in collective bargaining units by making those units just as elastic as we can make them. Sec. 111.02 (6), Stats. Your right is not the only right involved in industrial controversies. The employer has rights which we have likewise tried to protect. The public is interested in the protection of all of these primary rights, including the rights of employees not to be forced to join a labor organization if they deem it against their interests to join. In this act, we have given consideration to all rights, those of the public, the employee and the employer and we have set up an administrative agency for the protection and enforcement of all such rights.

The legislature has further said: If, with all the facility we have given you for purposes of organizing and bargaining collectively, if, with all the facility that we have given you with respect to ability to organize into units of collective bargaining, units which the employees themselves want (sec. 111.02 (6), Stats.), you are unable to make your views prevail through the ordinary methods of persuasion to a point where you have convinced a majority of employees in a collective bargaining unit that they have a substantial dispute with their employer, the public interest and the welfare of industry with which the public is concerned requires that the employer so circumstanced be not subjected to concerted coercive action directed at injuring him.

The legislature has said that combination and concert

of action directed at the injury of another by the use of coercive instrumentalities to effect such injury under such circumstances is prohibited conduct as the damage that flows therefrom to other rights equally entitled to protection far outweighs any benefit that labor may receive from such conduct in the light of all of the other provisions of the act designed to protect labor in the exercise of the right of collective bargaining.

G. Reply to specific arguments of the petitioners not heretofore covered.

1. The challenged section is not violative of the 14th amendment because of a threat or a fear of subsequent punishment with respect to the exercise of the right of free speech. The section can be no more subject to constitutional attack in this respect than the National Labor Relations Act.

On pp. 55-56 of their brief petitioners contend that the challenged section is violative of the 14th amendment in relation to freedom of speech because of the threat or fear of subsequent punishment which abridges or diminishes the free or effective exercise of that right. The same argument can be made with equal force with respect to lack of legislative power to deal with either civil or criminal libel, duress or frauds or to deal with intimidating or coercive conduct. Under the construction placed upon the section by the Supreme Court of the State, the board and the courts are charged with the duty of determining under the factual situation of each case and as a question of fact whether the overt concomitants of a strike are coercive. If they are

coercive they are proscribed activities. If not, they are not.

The merit of petitioners' argument may be further tested by applying the argument as a test of the constitutionality of the National Labor Relations Act.

In dealing with the problem of what constitutes coercion and interference on the part of an employer the Supreme Court of Wisconsin took a constitutional approach to the employer's right of freedom of speech in *Wisconsin Labor Relations Board v. Fred Rueping L. Co.*, 228 Wis. 473, 495-496. That court quoted with approval language in *Texas & New Orleans R. Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 568, 50 Sup. Ct. 427, 74 L. ed. 1034, and then used the following language:

> "There is little to add to the foregoing analysis. The right of free speech has never been considered to make impossible civil remedies or criminal prosecutions for libel, duress, or fraud, although speech was the agency in each case. The distinction between the exercise by an employer of his right of freedom of speech and the actual use of the spoken word as an instrumentality to overpower the will of employees is well understood, and constitutes the dividing line between what an employer may do and what he may not do. It may, of course, be difficult to determine in a particular case on which side of the line the activities of a particular employer fall, but this must be left to the trier of fact if there is room for conflicting inferences. * * *"

In dealing with the same problem the National Labor Relations Board, while perhaps recognizing the constitutional dividing line as a concept, in application of the con-

cept, literally denied employers all right to express any opinion. The *Ford case* is illustrative.*

The board's application of the concept is well summarized in the supplement to the Labor Relations Reporter for October 14, 1940, Vol. VII, No. 7, as follows: (p. 4)

> "The Labor Board, although asserting recognition of the constitutional rights of employers to freedom of speech, has constantly decided its cases on grounds which *in actual effect* so limit the right that any real use of it in respect to unionization of their own employees would be practically impossible.
>
> "The theory under which the Board reaches this result is that an employer's freedom of speech is a right which may be 'qualified'; that the Wagner Act does impose qualifications upon its exercise; and that, because of the employer's 'superior economic power,' *any* expression to employees of hostility to unionism or preference for one union over another is necessarily 'coercive' and therefore constitutes unlawful 'interference' by the employer."

The board in its application of the concept literally denied employers all freedom of expression. The employer had the right to express, but any time he expressed he *ipso facto* committed an unfair labor practice. The Board's strategy in the *Ford case* and the manner in which that strategy boomeranged is further analyzed in the Labor Relations Reporter supplement above referred to as follows: (p. 4).

> "The strategy of the Labor Board's argument before the Circuit Court of Appeals in the present case back-

*National Labor Relations Board v. Ford Motor Co., 114 F. (2) 905 (1940).

fired in a peculiar manner. Instead of pressing the theory upon which its decisions are often based—that *any* expression to employees by the employer of hostility to the union is necessarily coercive, and therefore *in and of itself* an unfair labor practice—the Board, apparently to avoid any chance of losing the particular case upon the appeal, took the much less extreme position that the expressions of the employer amounted to coercion in this case because of the *manner of expression.*

"When, therefore, the decision on appeal went against the Board on the free speech issue, although it won on all other issues, the Board not only lost that aspect of the particular case, but evoked from the court such a specific ruling on the permissible manner of expressing opinion as practically to inform all other employers that they have a constitutional right to communicate their opinions to the employees by printing pamphlets and handing them to each employee individually. * * *"

The obvious answer is that the fact that the Board *may* unconstitutionally apply certain provisions of an act so as to deny freedom of speech does not militate against the constitutionality of the act itself. Presumably, the courts will check any such Board attempt to apply the act in an unconstitutional manner.

It is idle to assert that employers know with any degree of certainty how far they may go in expressing opinions,—know with any degree of certainty whether they will be penalized for exercising what they consider to be exercise of the constitutional right of "freedom of speech". If, in the expression of an opinion, the character of the act is susceptible of being deemed coercive for an outlawed

purpose when weighed in the light of all of the facts and circumstances of the case, the employer can be and is ordered to cease and desist therefrom in the broadest conceivable language. The orders of the board as enforced by the decrees of the courts are enforceable the same as the orders of the Wisconsin Employment Relations Board as enforced by the decrees of the courts of the State. It may be and is difficult in many instances to determine whether an expression of ideas or opinion by an employer, under all the facts and circumstances of a case, is or is not coercive. That does not militate against the constitutionality of the National Labor Relations Act and for like reason it cannot militate against the constitutionality of the challenged section of the Wisconsin Employment Peace Act. The petitioners live under the same constitution as do employers of labor.

It is asserted by petitioners (p. 64):

> "* * * that, as a result of being found guilty of unfair labor practices, employees lose their status of employees under the act and are consequently deprived of the rights, privileges and immunities afforded by the act to other employees (sec. 111.02 (3) and 111.07 (4)). Gone is the right to vote, participate in the designation of representatives and to be protected from discharge because of union activity or affiliation. * * *"

Any such point was not particularly involved in this case when the case was argued and briefed in the Supreme Court and the Court had no occasion to give full consideration to the subject. The Court expressly repudiated any such construction of the act in the subsequent case of *Allen-Bradley Local 1111, v. Wisconsin Employment Rela-*

tions Board, 237 Wis. 164, 295 N. W. 791 (1941), in which case the point was involved and fully argued.*

2. The Wisconsin Court's use of the term "coercion" is not inexact or inaccurate.

The petitioners assert: (p. 72)

"We gather from the use of the term 'coerce' in the above respect that the Wisconsin court classified picketing, boycotting, or any other similar overt concomitant of a strike as being coercive per se. Either that, or the Court has said that such action by a minority group constitutes coercion, while such action when

*In the **Allen-Bradley case**, above cited, the court said:

"One of the principal contentions of appellants here is that fourteen strikers who were found guilty of unfair labor practices (acts of violence and coercion) are, under the terms of the National Labor Relations Act, still employees of the Allen-Bradley Company; that because of the finding of the Wisconsin Employment Relations Board that the employees were guilty of an unfair labor practice, that relationship is severed, consequently there must be a conflict between state and federal authority. There are two answers to this contention, first; the National Labor Relations Act has never been applied to the labor dispute here under consideration; second, a mere finding of the Wisconsin Employment Relations Board does not affect the employer and the employee relationship. Appellants' contention is based upon sec. 111.02 (3) of the Wisconsin Employment Peace Act. That part which is material is as follows:

'The term "employee" shall include any person, other than an independent contractor, working for another for hire in the state of Wisconsin in a non-executive or nonsupervisory capacity, and shall not be limited to the employees of a particular employer unless the context clearly indicates otherwise; and shall include any individual .... (b) who has not been found to have committed or to have been a party to any unfair labor practice hereunder.'

"Considering the language of this section by itself, it may warrant the interpretation put upon it by appellants, that is, that a mere finding is sufficient to deprive the employee of his status. However, when considered in connection with other provisions of the act, we think it cannot be so interpreted. That part of sec. 111.07 (4), Wis. Stats. 1939, which is material here, is as follows:

'Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend his rights, immunities, privileges or remedies granted or afforded by this chapter for not more than one year, and require him to take such affirmative action, including reinstatement of employees with or without pay, **as the board may deem proper.**'

"The continuation of the status of an employer is certainly a right or privilege. The act specifically provides how it shall be terminated, that is, by order of the board." (p. 181)

'licensed' or 'authorized' by a majority group does not constitute coercion."

The argument assumes as a premise upon which the analysis is grounded that minorities can never engage in coercive picketing. The premise is obviously false. Both minorities and majorities can engage in coercive picketing when the law sanctions same. Many matters sanctioned by the State Labor Code and the Norris La-Guardia act are obviously coercive but they are recognized as legal coercion under the acts in question. Picketing enmeshed with boycott (such as is described on pp. 90-93 of this brief) is obviously coercion but it has generally been recognized as legal coercion under such acts. It is not legal coercion under the Employment Peace Act when engaged in contrary to the provisions of the challenged section. Employees, workers and unions by concert of action may engage in such legal coercion under this section if there is a favorable strike vote taken pursuant to the terms of the section.* Neither majorities nor minorities may engage in such coercive picketing if they choose to disregard the provisions of the challenged section, as did the petitioners in the instant case. That type of picketing is not an exercise of freedom of speech. It is an exercise of power.

It is hardly necessary to point out that most of petitioners' arguments criticizing the validity of the challenged section are grounded upon a construction of the section repudiated by the Wisconsin Supreme Court. The petitioners' arguments are therefore beside the point. See for instance petitioners' brief, pp. 56, 57, 70, 71 and 76.

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*While the section relates to means, object must loom large in many cases involving its application.

POINT II

Sec. 111.06 (2) (e) is not violative of the 14th amendment to the constitution of the United States as denying to petitioners the equal protection of the laws.

A. Petitioners' argument contra is grounded upon repudiation of the principle upon which the whole structure of collective bargaining is rested.

Throughout the centuries labor has struggled for recognition of the principle of its right to organize and bargain collectively. The very foundation rock and cornerstone principle upon which the collective bargaining structure is erected is that of majority rule within an appropriate collective bargaining unit. Without recognition of such principle the entire structure of the collective bargaining system is without foundation or base. The system necessarily results in majorities speaking for and binding minorities. As was said by the Wisconsin Supreme Court in this case, "This principle is explicit in the National Labor Relations Act, in the Railway Labor Peace Act and in the act now under consideration." (R. II 60).

See: *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515, 81 L. ed. 789 (1937);

National L. R. Bd. v. Jones & Laughlin S. Corp., 301 U. S. 1, 81 L. ed. 893, 108 A.L.R. 1352 (1937).

In their argument upon this branch of the case the petitioners seek to repudiate and destroy the very cornerstone principle upon which the whole system of collective bar-

gaining is erected (see petitioners' argument, top of p. 61, and bottom of p. 37).

In the last analysis petitioners' argument is nothing less than a repudiation of all responsibilities which go with recognition of the right to bargain collectively. The petitioners' argument in essence is that majority rule within an appropriate collective bargaining unit is constitutional classification for purposes of conferring benefits upon labor. It is unconstitutional classification for purposes of making labor accept some responsibility in relation to the benefits conferred.

Petitioners urge that they are denied the equal protection of the laws under the 14th amendment unless short of actual violence and physical destruction of property or threats thereof they are permitted by concert of action to coerce conduct of others in accordance with their wishes and even though this is contrary to the wishes of the majority in an appropriate collective bargaining unit. As even a majority in an appropriate collective bargaining unit is not entitled to use violence or to resort to physical destruction of property or threaten same, it is apparent where petitioners' argument takes us. They claim to have the constitutional right beyond legislative power of control or regulation to direct all of the coercive and destructive forces of their organization, designed to compel and coerce action of others in accordance with their wishes *under any and all circumstances.*

If the strike is authorized by a majority in a collective bargaining unit and for a lawful object and the majority is permitted to use coercive weapons such as boycott and to use picketing as an instrument of perfecting and enforc-

ing that boycott (actually and factually what picketing is as used by AF of L unions), a minority must have the constitutional right to use all such coercive weapons (so petitioners argue) or they are denied the equal protection of the law.

Petitioners' argument is not only grounded upon repudiation of all responsibilities that go with recognition of the principle of collective bargaining, it also assumes as a premise that there can be no such thing as coercive picketing. There obviously can be. On p. 35 of petitioners' brief a question is posed as follows:

> "The question before discussed again presents itself—what is there inherent in the mere taking of a vote, or the failure to take a vote or the acquiescence by a majority to strike, which in the one instance presupposes that the picketing will not present a clear and present danger to the lives and property of citizens, and which, in the other instances, assumes that such clear and present danger will arise in every case of peaceful picketing?"

Such argument and similar argument (see pp. 69-71, petitioners' brief) with respect to unconstitutional classification because power cannot be granted to a majority to license a minority to exercise the constitutional right of freedom of speech is all beside the point. It is grounded upon a construction of sec. 111.06 (2) (e) repudiated by the Supreme Court of th State. The majority in a collective bargaining unit obviously does not determine whether a minority may exercise the right of freedom of speech. What the majority does do is to determine whether the conditions that prevail in their employment are such that coer-

cive instrumentalities directed at injury of another by concert of action ought or ought not to be used to remedy them,—whether the conditions that prevail are such as to justify such intentional injury. This determination is made upon the basis of the self interest of the affected employees, —the only practicable method whereby the legislature can determine such question. A determination of that question has nothing to do with the exercise of freedom of speech. It does have something to do with unjustifiable injury of another by combinations by use of coercion and the infliction of intentional injury by such use.

As to the supposed analogy of petitioners' situation to that of Republican voters after the last election (petitioners' brief, p. 37), it is obvious that the argument is grounded upon a construction of the challenged section repudiated by the Supreme Court of the State. It need hardly be argued that Republicans do not have a constitutional right to concert among themselves to deny all business contacts of every kind to all Democrats; to refuse to permit performance of any service of any kind by a Republican for a Democrat; to penalize by ostracism, fine, suspension or expulsion any Republican who does either the one or the other and to employ speech as the instrument by which this sort of conduct is perfected and enforced. Republicans do not have a constitutional right to concert to *coerce* Democrats to become Republicans or vice versa. Petitioners, like Democrats or Republicans, have a right to submit their ideas to the public so long as they are directed to a lawful object. The ideas must win recognition in the open market of public opinion. Petitioners have no constitutional right to *compel* acceptance of their ideas by coercion.

The one is freedom of speech—the other is freedom of compulsion. The one is guaranteed by the constitution. The other, if beyond the power of the legislature to regulate, destroys it.

B. The classification is entirely similar to that of the National Labor Relations Act.

The National Labor Relations Act recognizes the all-union agreement for what it is, namely a coercive instrumentality with respect to workers. The act permits the all-union agreement with a labor organization only where the organization is the representative of a majority of employees in an appropriate collective bargaining unit and then only where that organization does in fact represent an uncoerced majority.

Title 29 U. S. C. A., sec. 158 (3) and sec. 159 (a);

See also: *International Assoc. of Machinists, Tool & Dye Makers Lodge No. 35, etc. v. National L. R. Bd.*, 311 U. S. 72, 85 L. ed. 5, 61 S. Ct. 83 (1940);

National L. R. Bd. v. Jones and Laughlin S. Corp., 301 U. S. 1, 81 L. ed. 893 (1937);

Consolidated Edison Co. v. National L. R. Bd., 305 U. S. 197, 59 S. Ct. 206, 83 L. ed. 126 (1938).

If it is within the power of Congress to say that the minority of employees in a collective bargaining unit may be coerced by the employer into joining a union by the use of the all-union agreement, providing said union represents an uncoerced majority of employees in a collective bargaining unit in the field of labor relations, no good reason is per-

ceived why the State Legislature may not use the same majority method for determining whether the conditions which prevail in their employment are such that coercive instrumentalities directed at injury of another by concert of action ought or ought not to be used to remedy them,—whether the conditions that prevail are such as to justify such intentional injury.

Conceding legislative power to protect against concerted action directed at unreasonable injury of trade and unreasonable restraints thereof; conceding legislative power to legislate in the interests of industrial peace, regular and adequate income for the employee and in the uninterrupted production of goods and services; conceding legislative power to control concert of action to the end that it does not destroy or seriously hamper or impede government in its attempts to solve unemployment problems; conceding legislative power to balance protectable rights in the field of industrial relations to promote the peace, morals, health, good order and general welfare of the people as a whole, all of which must be conceded, it is difficult to perceive how any classification could be more germane to the objectives sought to be accomplished by the Act than that of a classification based upon the foundation principle of the collective bargaining process namely, that of majority rule within an appropriate collective bargaining unit.

POINT III

The order of the board, sustained and enforced by the courts of the State does not invade petitioners' constitutional right of freedom of speech under the 14th amendment.

A. The picketing at or near the hotels was set in a background of violence, force, fear, intimidation and coercion—the case is ruled by the Meadowmoor case.*

There is no point in repeating here the background of force, violence, intimidation and coercion which characterized the entire campaign of petitioners directed against the company as these facts are very fully set forth in our statements of facts (see pp. 14-27 this brief). The picketing that was conducted *at* or *near* the hotels was not a mere appeal to reason in any sense of the term. It was mass picketing with 75 or 80 pickets thrown about all entrances to the hotels. The picketing was characterized by repeated threats of violence, by actual violence, by the prevention by force and threats of prevention by force of delivery of products and essential services to and from and for the hotels and the prevention by force and threats of prevention by force of the rendition of necessary services to the guests of the hotels by employees of the hotels. Guests of the hotels were booed, sneered at, jeered and hooted. The same applies to members of the Business Institute of Milwaukee occupying under lease some nine rooms of space in the hotel, to the teachers of said Institute and the students who attended the Institute.

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*Milk Wagon Drivers Union, etc. v. Meadowmoor Dairies, Inc., 61 S. Ct. 552, 85 L. ed. 497 (Feb., 1941)

All of the foregoing was directed by the responsible officers of the unions. These responsible officers engaged in violence themselves, led the violence and led in the threats made. The union in most instances, provided bail, provided counsel fees and paid the fines of the members who were arrested and fined for the violence engaged in.*

The entire conduct of the strike *at or near* the hotels was that of a continuously coercive thrust directed at compelling the company to do that which it could not do under the State law, namely enter into an all-union agreement contract with petitioners contrary to the provisions of sec. 111.06 (1) (c) and (e) of the Act. The acts of violence, force, intimidation and coercion were neither "episodic nor isolated." Such acts were all part of a continuously threatening, intimidating and coercive thrust,—they were all part of a continuous manifestation of force directed at compelling action agreeable to the demands of the unions engaged in such manifestations. In spite of the city of Milwaukee's stationing six police officers at the hotel each day for the purpose of maintaining order, order was not maintained, much less a campaign of intimidation and coercion prevented.

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*Petitioners in their brief, p. 50 make a sympathetic appeal to the effect that human experience aptly demonstrates that a few fugitive encounters on the picket line in the early stages of the strike can no more be controlled or prevented by responsible leaders of organized labor than can the sun be stopped in its course. It is asserted that the intensity of emotion, the livelihood that is at stake, the desire to protect a job for oneself and one's dependents, all inject into strikes and picketing such elements that must of necessity in some cases and in the early days of a strike, lead to spontaneous eruption. It is not perceived wherein such sympathetic appeal is at all apposite to the facts of the instant case. The responsible officers in active charge of the strike and in active charge of the conduct on the picket line, themselves promoted, engaged in and were the ring leaders in the lawless conduct. Further, the strike did not involve any struggle for betterment of wages, hours or working conditions. The involved petitioners adamantly refused to permit the employees of the company to have anything to say about whether they should be compelled to be members of the petitioning unions as a condition of employment.

As a matter of fact any peaceful picketing that there may have been in the case at bar was much more enmeshed with a campaign of violence, intimidation and coercion than was the picketing in the *Meadowmoor case*. So far as the report of the *Meadowmoor case* shows, the picketing itself was at least peaceful and was not threatening. There were contemporaneous violent occurrences, or what this Court construed as contemporaneous violent occurrences, which formed the *background* of the peaceful picketing. In the instant case, it is not a mere matter of *contemporaneous background* as such. There was a continuous enmeshment by the pickets themselves and by the responsible officers of the unions conducting this picketing with acts of violence, intimidation and coercion. The clear result was a continuously threatening, intimidating and coercive campaign.

B. The order was narrowly adjusted to the factual situation presented to the board and dealt with by the courts of the state—the petitioners were not prohibited from picketing any place except at or near the hotels.

The order required that the petitioning unions (naming them), the officers, members, agents, successors and assigns of each shall (R. I 261)

"1. Immediately cease and desist from:

(a) Engaging in promoting or inducing picketing *at or near* the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company;

(c) Boycotting in any way the Plankinton House Company." (Italics ours)

This order is narrowly drawn and adjusted to the factual situation dealt with by the board and by the courts of the State. The order cannot possibly be construed as prohibiting picketing or as prohibiting advertising the facts of a labor dispute at any place except *at* or *near* the hotels, the place where, as before stated, the violent, intimidating and coercive campaign had been and was being waged by the responsible officers of the unions and all in spite of police protection. Under the circumstances, neither the board nor the courts had to rely upon a policeman's club as the sole means of preventing further conduct of the kind and character indulged in by the petitioners,—of the kind and character instigated and led by the responsible officers and agents of the petitioning unions, or as the sole means of counteracting the coercive effect of such conduct. The policeman's club had proved ineffective for either purpose. To deny to the board or to the courts of the state power to enter an order such as the one in question would be to deny to both the board and the courts the power to deal effectively with fear engendered by a blitzkrieg intended to engender fear,—calculated to compel and engaged in for the obvious purpose of compelling conduct through fear and the coercive effect thereof in accordance with the demands of those engaged in it.

Both the board and the courts, if they are to continue to function as instrumentalities of effective law enforcement, must have power to deal effectively with concerted action in the nature of a blitzkrieg such as the one in question. The conduct dealt with was no mere isolated instance of animal exuberance or enthusiasm. The evidence will not permit of any such appraisal of the conduct. Both the Circuit Court and the Supreme Court of the State so held (see pp. 41, 42, 136, 137, this brief).

1. The order is more narrowly drawn and adjusted to the factual situation dealt with than was the order in the Meadowmoor case. It does not prohibit advertising the facts of a labor dispute by any means whatsoever or at any place whatsoever except by use of picketing at or near the hotels.

Throughout the brief the petitioners endeavor to place boycotting upon the same plane as picketing (see petitioners' brief, pp. 25, 26, 32, 41, 52 and 70). It is asserted that the *Thornhill*, *Carlson* and *Swing* cases place the right to boycott upon the same constitutional basis as that of picketing. The argument seems to be grounded upon the proposition that a picket, requesting a person not to patronize a place is boycotting. So far as we know, such a request has not been construed to constitute a boycott or to constitute actionable conduct in the absence of malice. The term "boycott" itself implies the use of intimidating or coercive measures. The term implies measures directed at compelling action by virtue of the means employed,—it implies intimidating or coercive conduct far in excess of the mere submission of an idea or facts to the *public* and

the supporting of such idea and facts by peaceful persuasion to the end that such ideas and facts may win acceptance and recognition in the open market of public opinion.

The authorities are all agreed that the common denominator of any boycott is that of agreement by concert of action to withhold patronage or labor or to refuse to perform services or to purchase a product or products. See *Teller on Labor Disputes and Collective Bargaining*, Volume I, Page 444 et seq., Oakes C. ganized Labor and Industrial Conflicts, Page 603 et seq. The term "boycott" cannot be discussed except in terms of intimidation or coercion whether the boycott be primary or secondary. The agreement by concert which is the common denominator of any boycott is in no sense an exercise of the constitutional right of freedom of speech. It does not advise the *public* with respect to anything. It is a mere coercive means. It is a mere coercive instrumentality.

The AF of L is organized upon a basis of perfecting and mainfaining a boycott. The picket is the instrumentality by which the boycott is perfected and maintained, as one of the cornerstones upon which AF of L unionism is grounded is that of not permitting its members to cross a picket line (see p. 91 of this brief). Locals are affiliated with central bodies for the purpose of obtaining the united concert of action of all AF of L members in whatever trade, craft, industry or profession they may be engaged in support of the demands of a contending union. There is a tacit understanding among all affiliates that they will enforce the rule of not crossing a picket line by fine, suspension, expulsion or other disciplinary measure with respect to members who violate it. That rule means that all AF of L

truck drivers and deliverymen refuse to make any delivery at the picketed place of business; that rule means that firms who have had business relations with a picketed firm for years have their own business relations with that firm disrupted in that their drivers will refuse to make deliveries; that rule means that these firms must suffer such disruptions of their business or have labor difficulties of their own if they insist upon their AF of L drivers violating this fundamental rule of trade unionism.*

That rule means that independent contractors who employ AF of L labor and under contract to perform services will not be able to fulfill their contracts with any place of business where there is a picket, as AF of L members will not be permitted to work at the picketed place of business and will leave the job. (This literally means inability to get anything done in the construction line.) That rule means that AF of L orchestras will not be permitted to play at the picketed place.

Illustration might be piled upon illustration. An innocent picket, ostensibly operating within the area of freedom of speech in front of an employer's place of business and carrying an AF of L banner, is in fact the instrument by which such a boycott is perfected and maintained.

The boycott as practiced by the AF of L is obviously coercive and intimidating with respect to the employer against whom it is directed. It is coercive and intimidating as to employees of that employer if the object sought is that of compelling the employees to join a particular labor

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*It may further be noted that such firms are not permitted to discriminate against union men and union principles. Such firms can no more discriminate with respect to hiring than with respect to firing. Phelps Dodge Corp. v. National L. R. Bd., — U. S. —, 85 L. ed. 753, 61 S. Ct. 845.

union. The employer either has to suffer the injurious consequences of such boycott or violate the neutrality which both the National and State Acts require of him with respect to the free and untrammeled choice of employees in relation to collective bargaining matters. It is coercive and intimidating with respect to all employers of AF of L labor who customarily have business contacts with the picketed place of business. They either suffer disruption of their own business relations with that place of business or place themselves in the position of being accused of being "unfair" to organized labor. Any employer of AF of L labor who insists upon his AF of L employees violating the fundamental principle of trade unionism with respect to "not crossing the picket line" obviously is heading for labor trouble of his own within his organization and labor trouble of his own involves labor trouble with the entire AF of L organization. The boycotting as practiced by the AF of L is intimidating and coercive with respect to membership within the organization. All members of the organization even though their trade, craft, industry or profession is not even remotely affected by a particular controversy are expected to and are required to throw their support behind the objectives of the contending union and are required to refrain from all beneficial business contacts of any kind with the picketed place of business. The AF of L is here contending for the constitutional right to coerce employees to join its organization and for the constitutional right to coerce acceptance of this principle by its coerced members. It is here contending for the constitutional right to build coercion upon coercion,—to build power upon power and all under the 14th amendment to the Constitution as an exercise of freedom of speech.

Boycotting does not encompass that which is entittled to constitutional protection as freedom of speech.. There is not a hint or suggestion in any of the cases cited that an organized boycott is entitled to constitutional protection. Free speech under the constitution cannot be stretched to encompass any such conduct. The power of the legislature to deal with the problem of bigness,—the problem of power in relation to any combination, would be nonexistent if the right to boycott were ever conceived to have its roots in the constitution as an exercise of freedom of speech under the 14th amendment. Petitioners' argument is insidious. They seek by sublety throughout the brief to have this Court announce the doctrine that boycotting has its roots in the constitution as an exercise of freedom of speech.

By grounding their argument as to what constitutes a boycott upon a false premise, petitioners then urge that as they are prohibited from boycotting, the order of the board in effect prevents any appeal to the public by whatever means, etc. (See petitioners' brief, pp. 52, 53, 67 and 68.) The argument impresses us as one *in extremis*. No one has ever heretofore conceived that any fair interpretation of the order prevented the petitioners in any way, shape, or manner fro madvertising truthfully any relevant facts and making any truthful appeal to the public that petitioners wish to make through any channel of communication whatsoever and wheresoever, consistent with the right of free speech, with the one exception,—they may not picket *at* or *near* the hotels.

Petitioners do not believe the argument themselves. Their conduct throughout the entire period of the qualified stay granted by the Circuit Court of Milwaukee County

pending appeal to the Supreme Court belies any faith in the argument thus advanced. No stay of any kind was granted by the Circuit court with respect to the boycotting provision of this order (R. I 55). Throughout the entire period of the qualified stay, automobiles carrying signs on the tops thereof with the inscription, "Plankinton and Kilbourn Hotels do not have a contract with AF of L hotel unions. Please do not patronize." were used by petitioners for the period commencing about May 20, 1940. The automobiles daily and for eighteen hours each day, were driven throughout the city of Milwaukee and through the downtown area bearing such inscriptions. Five automobiles were used for such purpose. The automobiles were driven particularly in the vicinity of boat docks, railroad depots, at boat and train times and parked at said terminals where they would attract the attention of passengers arriving at said docks and depots and were driven through the down town area where large numbers of people would see and read such inscriptions.*

Further, the respondent unions and the responsible officers and agents thereof and the state and central bodies with which they were affiliated and the responsible officers and agents thereof and other unions asked the general public not to patronize the hotels and disseminated by word of mouth and in writing whenever opportunity presented that the Plankinton and Kilbourn Hotels were on the "we do not patronize" or "unfair" list and wrote and contacted by telephone persons and organizations that had contracted with said hotels for the holding of banquets or conventions

*See findings (a) and (b) p. 12. findings of fact and conclusions of law in the contempt proceedings, petitioners' appendix to reply brief in support of petition for writ of certiorari.

and urged said parties and said organizations to hold the banquets or conventions elsewhere. Such conduct was continuous throughout the entire period of the qualified stay.*

It is idle to urge that the order by its very terms (p. 52, petitioners' brief) "prohibits every conceivable type of activity which labor organizations might engage in for legitimate purposes." The order does no such thing. Petitioners have never so interpreted it.

The order of the board in the instant case is much more narrowly drawn and adjusted to the factual situation dealt with,—is much less subject to misinterpretation than was the injunction dealt with in the *Meadowmoor case*. In that case all the members of the petitioning union were prohibited

> "From interfering, hindering or otherwise discouraging or diverting, or attempting to interfere with, hinder, discourage or divert persons desirous of or contemplating purchasing milk and cream or other products aforesaid, including the use of said signs, banners or placards, and walking up and down in front of said stores as aforesaid, and further preventing the deliveries to said stores of other articles which said stores sell through retail; (or) from threatening in any manner to do the foregoing acts; * * *"

The injunction did not stop there. It brought within its sweep (or at least was subject to that interpretation) spoken or written words of any other person

> "who may * * * now * * * or hereafter * * * agree or arrange with them * * *"

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*Finding 15, Page 15, Petitioners' Appendix to Reply Brief in support of Petition for Certiorari.

See dissenting opinion of Justice Black in the *Meadowmoor case*. This court's comment in relation to what appears to be such sweeping language of the injunction was,

> "* * * It distorts the meaning of things to generalize the terms of an injunction derived from and directed towards violent misconduct as though it were an abstractt prohibition of all picketing wholly unrelated to the violence involved. * * * Such an injunction must be read in the context of its circumstances. * * *"

So reading the injunction, it was construed to be confined "to conduct near stores dealing in respondent's milk and it deals with this narrow area precisely because the coercive conduct affected it."

In the instant case there is no need at all for narrowing by construction any terms of the order of the board as sustained and enforced by the State Courts. The order is not susceptible of being construed as embracing any more restriction upon free speech than we have placed upon it as set forth above.

C. In sustaining the order of the board the courts of the State anticipated and anticipated correctly this court's holding in the Meadowmoor case.

Petitioners make the point that the board did not predicate its order upon the violent, intimidating and coercive character of the picketing engaged in and did not predicate its decision upon any finding that it could justifiably be concluded that the momentum of fear generated by past violence would survive (see petitioners' brief, p. 39). Petitioners further assert (p. 24) that the board did not find that the union's engaged in this conduct and further assert that the board could not so find. All that need be said upon the latter point is that the board could not possibly have found that the unions did not engage in such conduct,—could not possibly have found that the unions did not ratify the conduct. Under the facts of the case the board obviously could make no finding other than that the unions and the responsible officers and members thereof were responsible for and did approve and ratify the violent, intimidating and coercive (continuously such) character of the campaign.

The board's findings (findings 19-27; R. I. 257-259) are all directed to the violent method in which the campaign was conducted and the union's obvious connection therewith. It seems a rather far fetched argument to urge that the board did not consider the element of violence, force and intimidation, which characterized the campaign in framing its order. Why the particularity of the board's findings with respect to the official union positions of those engaged in the violent conduct and the fact that the union provided bail, counsel, and paid the fines, if the board gave

no consideration to the violence and the union's connection therewith in the framing of its decree? The board obviously did give consideration to the violent, intimidating and coercive character of the campaign carried on by the unions and framed its decree accordingly. What the board obviously did was to set forth in its findings so much of the violent, intimidating and coercive character of the campaign carried on by petitioners as to make manifest the nature, character and quality of that campaign and the union's perfectly obvious connection therewith. The board then adjusted its order to the facts dealt with.

In any event the question before the Circuit Court as well before the Supreme Court of the state was whether the order of the board, under the facts of the case, did contravene any constitutional right of freedom of speech. Under the Employment Peace Act the board makes its order in the first instance. In an action for enforcement or petition for review of a board order, the courts are given power to confirm, modify or set aside the order of the board and enter an appropriate decree (sec. 111.07 (7), Stats.).* The courts, like the board, by sec. 111.15, are charged with the duty of seeing that the order of the board properly adjusted to the factual situation dealt with in no wise violates the constitutional guarantee of freedom of speech.

The Circuit Court of Milwaukee County had held prior to this Court's decision in the *Thornhill case*, that "advertising the facts of a labor dispute" had its roots in the constitutional guarantee of freedom of speech (R. I

*This section, so far as material, provides:
"Upon such hearing the court may confirm, modify, or set aside the order of the board and enter an appropriate decree."

12-47). That Court in appraising the evidence in this case and in passing upon the question of whether the order of the board was adjusted to the evidence in the case and to the factual situation dealt with by the board, specifically upheld the order of the board upon the basis of the violent, coercive and intimidating conduct of the picketing involved and which characterized the campaign from its inception and from which evidence the Court concluded that the board was justified in finding that the attitude of the pickets was continuously threatening or that threatening conduct would be resorted to, should conditions be favorable to that purpose. (R. I 20-21).

In appraising the evidence the Court said: (R. I 24)

> "A full recital, with accurate references to the record, of almost daily conduct and occurrences extending from November 4th to November 18th, and thereafter to about November 27th, 1939, which must be considered ample to support the Board's conclusions as to a purpose to coerce, intimidate and injure, will be found on pages from 8 to 13 of the brief submitted by counsel for the Plankinton House Company. Repetition thereof at this time will not be necessary. The Captain of Police in charge of the force of men maintained on the ground, who has had much experience in maintaining peace and order, when pressed by counsel for the employees to minimize the acts of violence and disorder, very temperately answered: "I wouldn't say small, that depends on circumstances. It is a hard thing for me to answer that as to the amount —' (He was interrupted by counsel at this point: Rec. 448)."

The Court further said: (R. I 20-21)

> "Each case must turn on its own circumstances. In the cases at bar, the Board was justified in concluding that the violent methods, assaults or disturbances which were pursued or which ensued from the outset and from time to time thereafter were ample to characterize the whole campaign or to warrant a reasonable inference that the attitude of the pickets was continuously threatening, or that threatening conduct would be resorted to should conditions be favorable for the purpose. In this connection, constant presence of officers of the law and the nature of conduct employed were sufficient to warrant the Board's findings and conclusions."

Then again in said opinion (R. I 44) the trial court stated:

> "* * * The record presents ample facts and circumstances to warrant the Board's further conclusion that the acts so found characterized the entire campaign from its inception and its order that, for those reasons, it should be terminated."

The same observations apply to the decision of the Supreme Court. That Court in unmistakable language grounded its conclusion that the order did not violate any constitutional right of freedom of speech upon the violent, coercive and intimidating character of the campaign.

Petitioners' argument that the *Meadowmoor case* is not applicable literally goes to the length of urging that such case is not applicable because the State courts did not anticipate the exact language used by this Court in the *Meadowmoor case*. The concept that picketing has its

roots in the constitution under the 14th amendment concededly starts with the *Thornhill case*. See the *Meadowmoor case*. The field is largely uncharted except as this Court has dealt with very narrow issues in subsequent cases. State courts can hardly be expected to anticipate verbatim the language which this court may use in subsequent charting of the field. Both of the State courts in deciding this case clearly did anticipate the rationale of the *Meadowmoor case*.

It was impossible for the Supreme Court of the State to conceive that in the light of the factual situation dealt with by the board any question of freedom of speech could be involved in the order of the board prohibiting picketing *at* or *near* the hotels when engaging in picketing at or near the hotels had resulted in the kind of picketing involved in the instant action,—and all in spite of the policeman's club. The Court could not conceive that the police powers of the State were so circumscribed that the State lacked the power to prohibit that which gave rise to the conduct engaged in or to deal effectively and realistically with the coercive effect of such conduct.

Petitioners concede that the State Supreme Court anticipated this Court's holding in the *Meadowmoor case* when they assert that the State Court in its decision on motion for rehearing, attempted to place its decision upon nonfederal grounds so as to avoid review by this Court. When it is considered that the State Court rendered its decision on motion for rehearing on January 7, 1941, and that the *Meadowmoor* decision was not rendered by this court until January 18, 1941, and that prior to the latter date the State Court had no basis for knowing whether the rationale

of its decision with respect to this order would or would not present a federal question, it seems utterly unfair to the State Court to charge it with attempting to avoid a federal question.

1. The Trial Court's temporary stay order pending appeal to the Supreme Court of the State in no sense determined that it was unnecessary to prohibit picketing as prescribed by the order to eliminate from the case the coercive effect of past conduct or that similar conduct was not likely to be engaged in by petitioners at any propitious opportunity.

On p. 40 of petitioners' brief it is asserted that because the trial Court granted a qualified stay pending appeal to the Supreme Court of the state, that Court must have concluded that it was unnecessary to prohibit picketing as prescribed by the order to eliminate from the case the coercive effect of past conduct and further that said court must have concluded by virtue of granting the stay that similar conduct was not likely to be engaged in by petitioners at any propitious opportunity afforded for engaging in such conduct.

We invite a careful reading of the qualified stay granted by the Trial Court (R I 52-57). It will be noted from the terms of the stay that the petitioners requested a complete stay of all provisions of the order. It will be further noted that the Court refused a stay of any provision of the order including provision (a) relating to picketing but with respect to that provision qualified it by permissive provisions and conditions named in paragraphs (1), (2), (3), (4), (5), (6) and (7) of the stay order (R I 55, 56,

57). The permissive provisions were that the petitioners might, "between the hours of 7 and 8 o'clock A. M., 11:45 A. M. and 1:45 o'clock P. M. and 6 and 7:30 o'clock P. M. on days other than Sunday conduct fair and truthful advertising within the outer or curb side, one-third of the public streets in front of the hotel buildings * * * but not in any adjoining alley or passageways." The advertising was to be conducted by not more than two persons on each side of the hotel, each carrying or displaying a truthful banner or sign and passing and repassing along the full length of the front sidewalk of said hotels (the entire Michigan side of the Plankinton House to be deemed one front or side). The announcements upon the banners were not to be added to by any oral statements or arguments; such advertising was to be conducted without intimidation or coercion or any method involving fraud, misstatement of fact, violence, breach of the peace, or threat thereof and without impeding or interfering with the free use by others of the streets or highways or of the doors, entrances or exits of said hotels and without interfering with the loading or unloading of any baggage, merchandise or articles of any kind at any door, entrance or platform of either of said hotels. The Court carefully avoided any use of the term "picketing" in the stay provisions.

The court reserved jurisdiction to terminate these provisions in the event of any non-compliance. The petitioners were to furnish bond, approved by the court, in the sum of $1,000 for the payment of all damages, as provided in sec. 274.23, Wis. Stats. The petitioners were further to perfect their appeal and prosecute the same with all reasonable speed. Note the trial court's reference to sec. 274.23, Wisconsin Statutes.

At the time this stay was granted it was pretty generally conceded and the bar of the State was decidedly of the impression that when application for stay was made pending appeal, a stay had to be granted as a matter of right, provided the appellants gave bond pursuant to the provisions of the statute. The prior decisions were of such tenor. *State ex rel Boysa v. Fritz*, (1927) 192 Wis. 358, 212 N. W. 655 and *Halsey Stewart and Co. v. Public Service Comm.* (1933) 210 Wis. 184, 248 N. W. 458. There was a serious question whether the Court had any right to qualify the stay in any manner.

The fact that the trial court qualified the stay indicates that the trial court felt that there was an exigency to be met and that no stay should be granted save only such stay as appeared to be compulsory under the appeal stay provisions of the statute. The trial court made every effort to eliminate, so far as there appeared to be power to do so, future occurrences of conduct similar to that theretofore engaged in and endeavored to counteract, insofar as there appeared to be power to do so, the coercive effect of such past conduct. The Trial Court's interpretation of prior decisions as to the right of an appellant to a stay pending appeal upon the furnishing of bond prescribed by the Court was further fortified by the decision of the Supreme Court in *State ex rel. Dep't. of Agriculture v. Marriott*, 235 Wis. 468, 293 N. W. 154 (June, 1940,—decided approximately a month after this stay was granted).

The legal proposition that the trial courts of the State of Wisconsin do have power to exercise discretion with respect to granting of stays pending appeal with respect to the prohibitory as distinct from the mandatory provi-

sions of a judgment was finally decided by the Supreme Court in *Carpenter Baking Co. v. Bakery S. D. Local*, 237 Wis. 24, 296 N. W. 118 (Feb. 5, 1941). The qualified stay granted by the Circuit Court in the instant case was cited by the Supreme Court in the *Carpenter Baking case, supra*, as a model stay pending appeal.

Under the circumstances if any significance can be attached to the Trial Court's granting a qualified stay pending appeal, the significance must be the exact opposite of that for which petitioners contend.

2. Both the Trial Court and the Supreme Court grounded the validity of the order in question upon the violent, intimidating and coercive conduct which characterized the campaign as continuously threatening and coercive far more than did the Supreme Court of Illinois in the Meadowmoor case.

The full extent to which the Trial Court and the Supreme Court of the State anticipated this Court's holding in the *Meadowmoor case* in sustaining the order of the board has heretofore been analyzed. The Supreme Court of the State of Illinois in that case commented only very incidentally in its decision with respect to the justification of the absolute ban to counteract the effect of past violence as follows:

> "* * * picketing by the carrying of a banner with the words 'unfair' etc. printed thereon in connection with or following a series of assaults or destruction of property, could not help but have the effect of intimidating the persons in front of whose premises such picketing occurred and causing them to believe

that non-compliance would possibly be followed by acts of an unlawful character."

The Master, to whom the case had been referred, in the light of his findings of violence, had recommended an injunction such as that finally approved by the Supreme Court of the State. The Trial Court refused approval and limited the injunction to restraint of violent conduct. The Supreme Court reversed and decreed an injunction as recommended by the Master. There are but two short paragraphs in the entire opinion of the Supreme Court of Illinois which sought to justify the injunction approved upon the basis of preventing the coercive effect of past violence. The balance of the decision is directed to a discussion of what is legal and what is not legal conduct in labor disputes under the laws of the State of Illinois. The Supreme Court of the State of Illinois in a subsequent decision specifically stated that it did not ground its decision in the *Meadowmoor case* upon the violence engaged in and that "the issue of violence was not the turning point of the decision." *Ellingson v. Local Drivers Union of Chicago*, 2 Labor Cases, 567, 568, 377 Ill. 76 (1941).

D. Even if the case at bar is not ruled by the Meadowmoor case, the order of the board nevertheless is not violative of petitioners' right to freedom of speech under the 14th amendment as the picketing engaged in was for the purpose of compelling the company to commit an unfair labor practice by entering into an all-union agreement with petitioners contrary to the provisions of sec. 111.06 (1) (c) and (e), Stats.—the picketing was for an unlawful object.

The petitioners were bound by the arbitration award. The contract expressly so provided. That award provided that a closed shop was to be effective only upon the condition that the employees of the company, by a secret ballot conducted under the supervision of the Wisconsin Employment Relations Board, voted in favor of a closed shop by a 75 per cent majority. That provision conformed to the provisions of sec. 111.06 (1) (c) and (e) of the Act. The strike severed contractual relations. This point is res judicata. See footnote, p. 14. See also this brief, p. 90. The strike from its inception was therefore for the purpose of compelling the company to do that which it could not do under the law,—for the purpose of compelling the company to violate the law.

Further, as a result of the strike, the company employees formed an independent union known as the independent organization of Plankinton House Company employees. This union gained recognition as the collective bargaining agent of all employees of the company and was so certified by the board. That certification and the representation proceedings were confirmed and approved by the Circuit Court in its decision in May, 1940 (R I 47). That matter is likewise res judicata. Since the court's con-

firmance and approval of the board's certification of the independent union, the concert of action of the petitioners has been directed at compelling the company to meet another unlawful demand of the petitioners, namely, that of recognizing the petitioners as the exclusive representatives of its employees for collective bargaining purposes when the company is prohibited by law from recognizing any union except the union certified by the board as the exclusive representatives of employees for purposes of collctive bargaining. There can be no legal justification for picketing directed to such objects. (See pp. 12-65 of this brief.)

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CONCLUSION

What petitioners seek to establish in this case is a principle of a constitutional right of combinations (beyond the power of legislative control or regulation) to inflict intentional harm upon any and all who disagree with them and under any and all circumstances by use of all intimidating, coercive or destructive forces (means) which they can command short of actual physical violence or threats thereof (throughout their brief petitioners seek to place boycotting upon the same plane as picketing) if speech is an implementing or an enmeshed medium by which an unlawful object is sought to be reached or by which the unlawful means are made effective.

The foregoing is not an over statement of petitioners' argument. It is not an over statement of what is sought to be established in this case. The concept is so vicious and far reaching in consequence that the Supreme Court of Wisconsin, indeed traditionally liberal as asserted by peti-

tioners in their brief on motion for rehearing in that court, could not accept it. The great concept of freedom of speech under the constituiton cannot be stretched to a point where it destroys all other freedoms. It cannot be stretched to a point where combinations, whether they be combinations of capital or labor, are placed beyond the power of the legislature to cope with their exercise of power. The constitution of the United States lodged power to cope with such exercise of power in the legislatures of the several states. Freedom of speech may not be stretched to a point where such legislative power is in effect non-existent.

For the reasons herein stated the decision of the Wisconsin Supreme Court affirming the decision of the Circuit Court should be affirmed.

Respectfully submitted,

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